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IN THE

Supreme Court of the United States

NO. 78-357

LEILA G. BROWN, ET AL,
Plaintiffs-Appellees,

v.

JOHN L. MOORE, ET AL,
Defendants,

ROBERT R. WILLIAMS, ET AL,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT

Appellants appeal from the Judgment of the United States Court of Appeals for the Fifth Circuit, entered on June 2, 1978, affirming the Judgment and Orders of the United States District Court for the Southern District of Alabama, decided December 9, 1976. These hold that the existing electoral structure, the multi-member, at-large election of School Commissioners for Mobile County, results in an unconstitutional dilution of black voting strength under the Fourteenth and Fifteenth Amendments to the United States Constitution.

The primary elections scheduled for September 5, 1978, are to comply with the District Court's Order. On August 18, 1978, the Appellants herein filed an Application for Stay and Recall of Mandate to this Honorable Court asking that the elections be stayed pending this Honorable Court's review of the merits of this appeal. Appellants submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial, new and novel questions are presented under the Constitution of the United States.

OPINION BELOW

The Opinion of the Court of Appeals for the Fifth Circuit decided on June 2, 1978, is unreported. (5th Cir. No. 77-1583) The matter was disposed of on that Court's summary calendar pursuant to its Local Rule 18. The District Court's opinion is recorded in 428 F. Supp. 1123 (1976). Both Opinions are attached hereto as Appendices A and B respectfully. A motion for re-hearing was filed by the Appellants which was denied by the District Court on January 4, 1977. The Order denying the rehearing is attached hereto as Appendix C. The Judgment of the District Court, entered on January 18, 1977, is unreported. A copy of the judgment is hereto attached at Appendix D.

JURISDICTION

This suit was brought as a class action in behalf of all black citizens of Mobile County against the Board of School Commissioners of Mobile County, the Probate Judge, the

Court Clerk of Mobile County, and the Sheriff of Mobile County, contending that the at-large election system of electing school board commissioners unconstitutionally dilutes their voting strength in violation of the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States; under the Civil Rights Act of 1871, 42 U.S.C. §1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. §1973, et seq. The judgment of the District Court was entered on January 18, 1977; an Appeal was taken to the Court of Appeals, which rendered judgment affirming the District Court on June 2, 1978. Notice of Appeal was filed in the Court of Appeals on August 18, 1978. (Appendix F)

Mobile County's method of electing school board commissioners was adopted in 1919 pursuant to a state statute, Local Acts of Alabama, 1919, p. 73. Because the subject of this appeal is a judgment holding this state statute of local application unconstitutional, the jurisdiction of the Supreme Court to review this decision by appeal is conferred by 28 U.S.C. §1254(2). *United Gas Pipe Line Company v. Ideal Cement Company,* 369 U.S. 134; *Doran v. Salem Inn, Inc.,* 422 U.S. 922, *New Orleans v. Dukes,* 472 U.S. 297.

QUESTIONS PRESENTED

1. Whether or not the District Court erred in holding that a showing of impermissible racial purpose or intent was constitutionally unnecessary to Plaintiffs-Appellees' claim that Mobile County's at-large electoral system is violative of the Fourteenth Amendment in light of the decisions of the United States Supreme Court in *Washington v. Davis,* 426 U.S. 229 (1976); *Village of Arlington Heights v. Metro-*

politan Housing Corporation, 429 U.S. 252, and *United Jewish Organization v. Carey,* 430 U.S. 144 and the decisions of this Court in *Bradas v. Rapides Parish Police Jury,* 508 F.2d 1109 (5th Cir. 1975); *Nevett v. Sides,* 533 F.2d 1361 (5th Cir. 1976); and *McGill v. Gadsden County Commission,* 535 F.2d 277 (5th Cir. 1976)?

2. Whether the District Court erred in failing to make specific findings as to minority access to the slating process, such as the existence or absence of screening organizations, petition requirements, or other barriers to minority group members?

3. Whether the District Court's conclusory finding that "no black person has ever been elected School Commissioner in Mobile County" justifies the District Court to make a finding that a lack of openness exists in the slating process?

4. Whether or not the District Court erred in assuming that only black political participation which led to election of black commissioners would indicate constitutionally sufficient access by blacks to the School Commissioners' election?

5. Did the District Court err in making no specific findings as to whether or not the Mobile County School System was presently providing equal educational services to all communities within the county?

6. Whether or not the District Court erred in making no specific findings concerning the distribution of educational jobs and the appointments of blacks to various faculty and administrative positions?

7. Whether or not the District Court erred in ruling that the primary factor as identified in the case of *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973), that is, the strength of state policy favoring at-large elections, was

neutral, in light of the fact that no finding was made by the Court showing a "tenuous" state policy?

8. Whether the District Court erred in holding that past unresponsiveness of the School Board and past racial discrimination preclude blacks from present effective participation in the at-large system of electing School Commissioners of Mobile County?

9. Whether the Plaintiffs have met their burden of proving, in aggregate, the primary factors as stated in the case of *Zimmer v. McKeithen,* 485 F.2d 1297 (5th Cir. 1973)?

10. Whether or not the District Court's Order is, in fact, judicial legislation violating the principles of Federalism and the Tenth Amendment of the Constitution of the United States?

11. Whether or not the Constitutional Rights of one of the School Board Commissioners have been violated by the District Court's Order, his right to vote as a school board member and his right to run again as an incumbent for the Mobile County School Board having been disenfranchised?

STATUTES INVOLVED

This case involves the constitutionality under the Fourteenth and Fifteenth Amendments to the U. S. Constitution of Local Acts of Alabama, 1919, p. 73, setting forth the method of electing School Board Commissioners in Mobile County, Alabama. Said Act is set forth in Appendix E hereto.

STATEMENT

The District Court granted Plaintiff's prayer that the Defendants be enjoined in certifying the results of any

election for the School Board under the at-large election system and from failing to adopt a single member district plan, redistrict as set out in the District Court Order and make and hold the election as redistricted. The evidence below did not show that the present form of electing Mobile County School Board members was established with a racially discriminatory purpose. The evidence below shows that there are no barriers, petition requirements or screening organizations to minority group members; that blacks are not denied participation in the at-large political process, but to the contrary, the facts overwhelmingly indicate that blacks participate actively and influentially. The District Court based its Order upon a putative constitutional right of blacks to elect blacks to the Mobile County School Board. Finding that the at-large electoral scheme was not arranged to guarantee such a result, the District Court ordered the adoption of the single-member district plan. The United States Supreme Court, however, has made it crystal clear that members of a minority group do not have a federal right to be represented in proportion to their numbers in the general population. *Whitcomb v. Chavis,* 403 U.S. 125, 149; *Beer v. United States,* 425 U.S. 130.

The evidence below further shows that the findings of the District Court merely reflected conclusions. The Court's conclusory statements on the most important questions of black access to and participation in the political process in the at-large system of electing school board commissioners of Mobile County are clearly in error.

The Fifth Circuit itself in *Hendrix v. Joseph,* 559 F.2d 1265, 1268 (1977) stated;

> Conclusory finding by the trial court that there has been dilution is not sufficient. See *Nevett v. Sides,* 533 F.2d 1361 (5th Cir. 1976). It remains therefore to address each of the factors through which a plaintiff may show dilution. In doing so, we keep in mind that *while no factual finding may be disturbed unless clearly erroneous, the failure to find facts necessary to support a result in an error at law.* (Emphasis supplied)

The District Court's Order failed also to make findings of fact sufficient in detail and exactness to indicate the factual basis for the ultimate conclusion reached by the Court. See *Blacks United for Lasting Leadership, Inc. v. City of Shreveport,* 571 F.2d 248, 250 (5th Cir. 1978). An Appellate Court cannot second-guess what additional evidence a District Court might have entertained in its conclusion. The Court must make specific findings. See Id. at p. 253. Also, because the Plaintiff-Appellees, did not demonstrate a lack of access to the political processes in Mobile County and did not establish that the Board of School Commissioners were unresponsive to the needs of the black community, this weighs heavily against an inference of intentional discrimination because the incumbents are not visibly exploiting their majority status to the detriment of the minority constituents. See *Nevett v. Sides,* 571 F.2d 209 (5th Cir. 1978) "Nevett II".

A. MOBILE COUNTY PUBLIC SCHOOL SYSTEM WAS ESTABLISHED WITH A RACIALLY NEUTRAL, GOOD GOVERNMENT PURPOSE.

The public school system of Mobile County was established on January 10, 1826, by the Legislature of Alabama, which also brought into existence the Board of School Commissioners (Acts of Alabama, 1825-26, p. 35-36). This was some 28 years before the establishment of a public school system for the remainder of Alabama in 1854.

At that time, the Legislature provided for a school board composed of citizens of the county elected by the voters of the county in country-wide, at-large elections. The only testimony before the District Court upon the question of whether this legislation establishing the school system in 1826 was enacted for a discriminatory purpose was that of Dr. Melton McLaurin, an historian who testified in behalf of the Plaintiffs as an expert witness. From Dr. McLaurin's testimony, it is entirely clear that this statute was not passed with a discriminatory purpose in mind, and could not have passed with a discriminatory purpose or intent, because black people could not even vote in the State of Alabama at that time, were not a political factor, and were, in Dr. McLaurin's words, a political non-entity. (Tr. 217, 241).

Over the years, by passage of various local acts in the Legislature, adjustments were made in various aspects of the Mobile County Public School System and of the School Board itself. Throughout, however, the manner of the election of the Board, country-wide at-large elections, remains consistent. One deviation occurred in 1876 (Acts of Alabama, 1876, p. 363), when the Legislature passed an act requiring that at least two of the then nine commissioners must reside within six miles of the courthouse of the county.

The statute which provided for the present existence of the Board came into being as a local act passed by the Legislature in 1919. Local Acts of Alabama, 1919, p. 73 (See Appendix "E" attached hereto). On that occasion, the Legislature set the number of Board members at five and continued to provide for the Board members to be elected by the voters of the county at-large, for staggered terms of six years with elections held every two years. In his testimony, Dr. McLaurin also stated that this statute passed in 1919 did not have a racially discriminatory purpose, simply because

in the adoption of the Constitution in 1901, the State of Alabama had again, after brief franchisement during the reconstruction years, completely disenfranchised blacks and removed them from the political process within the state so effectively so as to again cast them as a political non-entity; and since this state of affairs endured from the adoption of the Constitution in 1901 until approximately 1944, according to Dr. McLaurin, the statute passed by the Legislature in 1919, could not have been passed for discriminatory purposes. (TR. 220-222, 242).

There was no testimony below upon this aspect of the case other than that of Dr. McLaurin and his testimony rather than establishing that the statute was passed for a discriminatory purpose, clearly establishes exactly the opposite. Not only, therefore, have the Plaintiffs not carried the burden of proving that the statute was enacted for discriminatory purpose, but to the contrary, it has been affirmatively proven that the statute was not enacted for a discriminatory purpose.

B. MOBILE COUNTY'S ELECTORAL SYSTEM OF ELECTING SCHOOL BOARD COMMISSIONERS PROVIDES EQUAL ACCESS FOR ALL PERSONS TO THE POLITICAL PROCESS, BLACKS PARTICIPATE ACTIVELY AND EXERCISE SIGNIFICANT VOTING POWER.

1. There are no screening organizations, petition requirements or barriers to black participation.

The evidence is uncontradictive below that every phase of the processes of registration, voting, qualification and candidacy for the Mobile County School Board Commission

is as open to the blacks as to whites.

There are no white-dominated slating organizations in Mobile County. There are no formal prohibitions on registration or voting. No political party structure fails to solicit black participation. The at-large system of electing School Board Commissioners in Mobile County is conducted on a non-partisan basis.

The District Court found that "there are no formal prohibitions against blacks seeking office in Mobile County". (428 F. Supp. 1123 [1976]).

2. All candidates seek support of black voters because the black vote is essential to winning an election in Mobile County.

The testimony is replete with evidence that candidates for the Mobile County School Board actively seek black votes. (Tr.629, 697, 885, 971, 1277, 1279, 1293, 1305).

Defendants' witness, John H. Friend, testified as follows (Tr. 885):

Q. All right, sir. How many times have the dominant black wards voted for the candidates receiving the most votes?

A. Since 1960, there have been 27 races. In 19 of those races persons in black wards, the dominant black wards, voted for a winner.

Further, Mr. Friend stated (Tr. 971):

Q. So you're saying that some of the candidates who won whould have lost if the blacks hadn't voted for them, is that right?

A. What I am saying is that blacks reversed their voting pattern . . . yes, the two top men, it would have changed it. This comes as no surprise to me. In my experience, I have found that there is something that candidates are very much aware of in the Mobile area; that the black vote counts.

The Court stated (Tr. 992):

THE COURT:

If this would help you any, Mr. Blacksher, I think that you can safely state that the black vote is extremely important given certain context. Politics is a dynamic thing. There are many factors involved in any election . . .

Plaintiffs' witness, State Representative Gary Cooper, testified as follows (Tr. 412):

Q. Did you receive endorsement and support of the Teamsters Union:

A. Yes, sir.

Q. Did you consider that support important?

A. Not necessarily, in my district, sir.

Q. Did you receive the endorsement and support of the Non-Partisan Voters League?[1]

A. Yes, sir.

Q. Did you consider that support important?

A. Reasonably, sir.

Q. Did you receive endorsement of the Mobile Press Register?

A. Yes, sir.

Q. Did you consider that endorsement important?

A. That is questionable, sir.

It is obvious from the above testimony that Mr. Gary Cooper placed greater value on the black vote than the union or newspaper endorsement.

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[1]The NPVL was formed in 1963 as the local arm of the NAACP, after the local branch was enjoined from political activities in Mobile for failure to surrender its membership list. The NPVL is still a separate branch of the NAACP. (Testimony of Plaintiff, Wiley Bolden, in the case of *Bolden v. City of Mobile, Alabama*, 423 F. Supp. 384 [1976]; aff'd 571 F.2d 238.)

Plaintiffs' witness, Senator Edington, testified as follows (Tr.602, 3):

Q. Isn't it true that almost all candidates for countywide office that you have known that wanted the vote of the black community?

A. Well, basically, anyone running for office wants all the votes he can get.

Q. Wouldn't you say the black community here in Mobile County is the most cohesive voting group that we have in this county?

A. I would say up until the last probably two years. I don't know that it would be really true right now, but by and large I know of no other group that votes together nearly so much as the black community of this city or this county.

Q. Well, it might not be true today, wouldn't you say that the Non-Partisan Voters League was the single most effective endorsing organization in our county?

A. In general, yes. Now, on an actual union-management question, possibly the Southwest Alabama Labor Council could have similar effect, but, basically, for the general issues, the Non-Partisan Voters League was the most cohesive and the most effective voter organization.

Q. And there has never been in Mobile County, as far as you know, a comparable white organization as effective and as long standing as the Non-Partisan Voters League; is that correct?

A. That is correct.

He further testified as follows (Tr. 612):

Q. Your wife got beat by a solid black vote, didn't she?

A. It wasn't absolutely solid, she obviously got a number of votes in the black community.

Q. Wasn't she defeated by an overwhelming black vote?

A. Oh, yes.

Q. And the Non-Partisan Voters League endorsed Mr. Cooper, didn't they?

A. Yes, I'm certain they did.

Q. And there is no comparable white endorsing group in this district, is there?

A. That is correct.

Finally, Senator Edington stated (Tr. 629):

Q. Would you say that the black vote in Mobile County is far and wide the most cohesive group vote in Mobile County?

A. It has been for the past 10 or 12 years. It is less so now than in the past.

Plaintiffs' witness, State Representative Buskey, states as follows (Tr. 735, 6):

Q. Wouldn't you say that the election endorsement was followed by the black community pretty much up until the death of John LeFlore?

A. Yes, sir, I would say that is correct.

Q. And he died in December of '75, didn't he?

A. Yes, sir. I had it January.

Q. Well, maybe you're right, January of this year or December of '75?

A. Yes, sir.

Q. And up until that point of time, the election endorsement has been extremely effective, hasn't it?

A. Up until that time. Well, really, if you will go back two years, when John officially entered politics, the election endorsement had been effective. I think that two years ago when Mr. LeFlore sought the House District 99 seat, I am sure his concentration was on getting elected more so than trying to get the voters out

or seeing that the endorsement of the League was adhered to. So, prior to two years ago, I would say the Non-Partisan Voters League was very effective in getting out the votes and swaying the voters.

It was also undisputed that City Commissioner Joseph Langan was elected and re-elected four times to the City Commission with vital support of the black voters; that he remained in office from 1953 through 1969 (Tr. 764). Further, the testimony is clear that whenever Mr. Langan ran for office, he was always endorsed by the Non-Partisan Voters League, the principal black political organization in Mobile County (Tr. 783).

C. MOBILE COUNTRY SCHOOL BOARD COMMISSIONERS ARE EQUALLY RESPONSIVE TO BLACK AND WHITE CITIZENS.

1. The undisputed facts of the accessibility of Mobile County School Board Commissioners to all citizens.

The Plaintiffs did not establish that black citizens have particularized needs separate and distinguishable from those of all citizens of the County from the standpoint of education and the matters within the purview of the Board of School Commissioners of Mobile County. Beyond that, however, the Plaintiffs produced no proof below that the School Board has been or is unresponsive to the interest of any of the citizens of Mobile County, black or white.

In an effort to prove unresponsiveness, the Plaintiffs called Mrs. Janice McArthur to testify. Mrs. McArthur, president of a group composed of both black and white citizens, which gratuitously devoted itself to identifying and solving what is

conceived to be problems of the school system arising as a consequence of the desegregation process, testified concerning four occasions that she and her group had become involved in school matters. (Tr. 543, 4). Her testimony indicated, in each instance, that they sought to resolve a particular problem with a principal of a local school and, being unsuccessful in doing so, on each occasion they were ultimately able to resolve the problem by discussion with Central Office Administrative Personnel of the school system. (Tr. 545, 556, 565, 569). Mrs. McArthur also indicated that on one occasion she and the members of her group attended one of the bi-weekly public meetings of the School Board and were unable to address the Board at the meeting because they had not taken the necessary steps to place their names in line among those appearing that day to address the Board. (Tr. 577). She further testified, however, that at a subsequent meeting she and her group appeared and addressed the Board with no difficulty. (Tr. 580). Other testimony established that all meetings of the School Board are open to the public and that the only prerequisite to addressing the Board at its public meetings is to come to the meeting and sign in on a tablet provided to maintain order among those who are appearing that day to address the Board (Tr. 579, 1174, 1175). Clearly, there is no showing of unresponsiveness on the part of the Board in the testimony of Mrs. McArthur.

In a further effort to establish unresponsiveness, the Plaintiffs produced the testimony of Mr. Cain Kennedy, who testified that he had received complaints from non-tenured teachers in the school system whose contracts of employment were not renewed. (Tr. 320). Mr. Kennedy was instructed by the Court to furnish the Court and Counsel with the list of those people from whom he had received such

complaints, but he failed to do so. The testimony of Deputy Superintendent J. Larry Newton established that over the past three years, encompassing the period of time that Mr. Kennedy has been in Mobile, there have been ten non-tenured teachers whose contracts have not been renewed; of the ten, five are black and five are white (Tr. 1180, 1181).

Mr. Kennedy also indicated that a black citizen had complained to him of discipline procedures at Murphy High School but he could offer no specifics (Tr. 321, 322). In response, Assistant Superintendent Clardy testified as to the specifics of the formulation and application of the discipline policy, indicating coincidently that the policy was formulated in consultation with the Plaintiffs' attorney and has been acclaimed nationwide as one of the ten discipline policies selected as model policies in that area of school administration (Tr. 1197-1199). Mr. Clardy also testified as to the even-handed manner of the application of the discipline policy and confirmed that over the past five years all matters of disciplinary suspension have been satisfactorily resolved, either at the local school level, or at the administrative appeal level provided by the policies; and that no suspension matter has gone to the Board for consideration, as also provided by the policy, during the entire period of existence of the policy (Tr. 1206, 1207). Certainly there is no proof of unresponsiveness in this testimony from Mr. Kennedy.

In a further effort to prove unresponsiveness, the Plaintiffs also offered the testimony of Mr. Gary Cooper. Mr. Cooper testified that the grass at Dunbar School had not been cut on the day that he had come to Court and he also testified that he was concerned for black teacher applicants who could not gain employment in the Mobile County School System (Tr. 350, 351). Assistant Superintendent Benson testified as

to the even-handed application to all schools of maintenance and upkeep procedures under his supervision, and of immediate problems in cutting the grass at all the schools in the system due to the prevailing rainy weather at the time (Tr. 1258, 1259, 1260). Upon the matter of teacher employment, Deputy Superintendent Newton and Lemuel Taylor, who is an Assistant Superintendent in charge of the Division of Personnel with responsibility for the hiring and firing of all teachers in the system (and who is, himself, a black) testified that the system had more than 2,000 applicants that year for approximately 100 teaching vacancies; and that vacancies are filled in a manner calculated to maintain an overall 60-40 white-black ratio of teachers in the system as required by the prior Federal Court Order (Tr. 1182, 1183).[2] The Federal Court Order had required the school system to determine the ratio of white and black teachers in the system as a whole upon a given time and then to assign teachers throughout the several schools of the system so that each school would then have the same white-black ratio of teachers.[3] Certainly there is no proof of unresponsiveness in Mr. Cooper's testimony.

The evidence was uncontradicted that the Mobile County School System presently provides equal education services to all communities within the county. The testimony of the Defendants' witness, Dr. Henry H. Pope, is uncontradicted. (Tr. 1219-1240). Clearly, his testimony conclusively showed that educational services are equally provided to minority group members in Mobile County.

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[2]35.4 percent of Mobile's population is black. 32.5 percent of the County's population is non-white. R. 733.

[3]428 F. Supp. at 1130, 1131.

The evidence is uncontradicted that the Mobile County School Board does not discriminate against minority group members within the Mobile County School System. The Defendants' witness, Mr. Larry Newton, testified that blacks are not discriminated against and that the distribution of educational jobs, appointments of blacks to various faculty and administrative positions is carried out in a non-discriminatory manner (Tr. 1180-1190). The District Court, however, made reference to earlier discrimination and desegregation cases involving the Mobile County School Board as constituting "devastating evidence of the complete unresponsiveness and resistance on the part of the Board to the particularized needs and aspirations of the black community". As made clear in *Blacks United for Lasting Leadership, Inc. v. City of Shreveport,* Supra, the correct issue to be decided is "whether the past denial has *present* invidious effect."

D. MOBILE COUNTY'S POLICY IN FAVOR OF ITS AT-LARGE ELECTION OF SCHOOL BOARD COMMISSIONERS IS NOT AT ALL "TENUOUS".

A thorough examination of the legislative history of the Mobile County Public School System and the existence of public schools throughout the state in general will show that there now is and historically has been a decided preference for school system governance by school boards elected on a county-wide at-large multi-member district basis. The legislative history of the Mobile County School System shows that it was created in 1826 and that at that time provision was made for the election of all the members of the Board on a county-wide at-large basis. This method of governance of the school system has endured since the creation of the school

system in 1826. As to the remainder of the State, for which provision has been made for public school systems separate and apart from Mobile County, there has also been a clear preference for county school systems to be governed by school boards elected by the county in at-large elections. This preference for at-large elections originated with the establishment of the first public school system in the state as a whole in 1854 (Acts of Alabama, 1853-54, p.8), and it has carried forward to the law of Alabama since that time. It appeared in the Alabama School Code of 1927, and now appears in the Code of Alabama, §16-8-1 (1975), where it is provided that County Boards of Education shall be composed of five members who shall be elected by the qualified electors of the county.

It is clear after looking at the record below and the District Court's opinion that the Plaintiffs have failed to carry the burden of proof in establishing a "tenuous state policy". The conclusory finding that a lack of state policy must be considered as a neutral factor is in error and must be considered another example of the District Court's improper analysis of the *Zimmer* factors.

E. RACIALLY DISCRIMINATORY PURPOSE IS AN ESSENTIAL ELEMENT OF AN EQUAL PROTECTION VIOLATION WHICH THE PLAINTIFFS-APPELLEES FAILED TO PROVE.

The claims which the Plaintiffs-Appellees presented to the District Court were actions for relief under the equal protection clause of the Fourteenth Amendment. Although at-large electoral schemes perhaps have the potential of merging minority interests, they cannot be considered

unconstitutional per se. *Whitcomb v. Chavis,* Supra, 402 U.S. at 159-60. The fact that at-large elections "diminish to some extent" black voting power does not in itself constitute an unconstitutional denial of effective participation or access to the political process. *McGill v. Gadsden County Commission,* Supra, 535 F.2d at 281: "Where racial intent is not shown, blacks are not suffering because they are black but simply because they, like many other interest groups, constitute a minority of voters." Carpenenti, "Legislative Apportionment; Multi-Member Districts and Fair Representation", 120 U. of Pa. Law Review 666, 698 (1972).

Simply because it may be more difficult for blacks to elect black representatives in an at-large electoral system does not mean that such a system is unconstitutional. "Under the Fourteenth Amendment the question is whether the [electoral] plan represents purposeful discrimination. . ." *United Jewish Organizations of Williamsburg, Inc. v. Carey,* 430 U.S. 144. The case of *Washington v. Davis,* 426 U.S. 229, the landmark case in this area, "made it clear that official action will not be held unconstitutional solely because it results in a racially disproportionment impact. . . proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause". *Village of Arlington Heights v. Metropolitan Housing Development, Inc.,* 429 U.S. 252. Thus, this Honorable Court's decision clearly shows that the necessary sensitivity to racially invidious purpose is an essential element involved in any equal protection analysis. Since the District Court made no findings of fact that the at-large electoral scheme of electing Mobile County School Board Commissioners was created with a discriminatory purpose or intent, the District Court's Order is legally insufficient.

THE QUESTIONS ARE SUBSTANTIAL

A. ALL THE QUESTIONS ARE SUBSTANTIAL AS THE COURT'S ORDER AFFECTS THOUSANDS OF MOBILIANS AND ABROGATES AN ELECTORAL SCHEME IN USE FOR ALMOST 60 YEARS.

The Appellants submit that all the aforesaid discussions involve questions substantial in nature. Any time an electoral structure of an entire county is changed, it is obvious that thousands of people will be affected. An electoral scheme almost 60 years old has been abrogated. The Appellants, however, would, at this point, refer this Honorable Court to the following specific substantial questions which they feel warrant separate discussion.

B. THE ORDERS APPEALED FROM ARE JUDICIAL LEGISLATION VIOLATING THE PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

There is an overriding Constitutional principle under our Federal system of Government with which these legislative orders directly conflict and which requires that such orders be set aside under the Constitution of the United States.

The Power under Federalism and the Tenth Amendment is to reserve to the "States" the powers, forms and integral forms of local government.

The case of *Whitcomb v. Chavis,* Supra, 403 U.S. at 156-

160, makes it quite clear that the Federal Judiciary does not sit as a body of political scientists weighing the ethicacy of bearing theories of government or political representation. As the Fifth Circuit itself has stated in *Hendrix v. Joseph*, Supra;

> "In each of these dilution cases the Federal Court is being asked to interject itself into a state-created electoral system to replace it with a radically different scheme because of supposed Constitutional infirmities. Before engaging in such aggressive interference with what has traditionally been regarded as state function, thorough and detailed findings on each issue that the Courts have thus far found to be relevant must be made. To allow conclusory findings that 'the government is unresponsive', and that 'no black has ever been elected' to substitute for such detail would alter the balance that our Constitutional system of Federalism is designed to protect".

The same Court stated in *David v. Garrison* that "the Courts must be careful to upset the legislative plan adopted by the people only when the Constitution clearly dictates that such plan is unlawful". 553 F.2d at 926.

C. THE DISTRICT COURT'S ORDER AS AFFIRMED BY THE COURT OF APPEALS EFFECTIVELY DISENFRANCHISED ONE SCHOOL BOARD COMMISSIONER'S RIGHT TO VOTE AND RIGHT TO RUN FOR REELECTION AS AN INCUMBENT TO THE SCHOOL BOARD IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The District Court's ruling effectively disenfranchises the right to vote of one of the present board members from 1978

to 1980, by modifying his term of office. Under the ordered single-member district plan which requires residence in the district which the commissioner represents the present Board members now reside in the following districts: Commissioners Bosarge, Alexander and Berger in District Two; Commissioner Sessions in District Four; Commissioner Drago in District Five. (R. 774).

Since no one resides in District Three, which has a majority black population, the Court stated that said district was entitled to a commissioner in 1978. Commissioner Sessions resides in District Four which has a majority black population and this district also is entitled to a place in 1978. Since Sessions' term expires in 1978, there is automatically a vacancy in this district. In order for District Three to have a place, one other Board member's term must either be shortened or modified. The District Court decreed that two members with the least remaining time of service, Alexander and Drago, would be the logical choices. (R. 774). Rather than shortening a commissioner's term, the District Court ordered that the Board, prior to the general election in 1978, elect a chairman, either Alexander or Drago, to occupy such a position until 1980. (R. 774). This chairman would serve without the right to vote, a fundamental right of all of the present Board members. Code of Alabama, Section 16-8-4 (1975). In addition to cutting off the chairman's right to vote, the District Court's opinion has other serious implications. Although the District Court stated that no incumbent member of the Board shall be deprived of his unexpired term of office because of such re-districting, the District Court's ruling clearly cuts off Commissioner's Alexander's right to run again as an incumbent in 1980. (R. 777). In order to have new commissioners elected from Districts Three and Four in 1978, the District Court's ruling created a Board consisting

of six members. It was ordered by the District Court that there shall be elected in November of 1978 school commissioners for Districts Three and Four; there shall be elected in November, 1980, one commissioner from District Five; and there shall be elected in November, 1982, commissioners from Districts One and Two. (R 790). Commissioners Bosarge, Berger and Alexander presently reside in District Two; Commissioner Drago resides in District Five. Commissioner Alexander's term of office expires in 1980. Under the present Court Order, Commissioner Alexander has been disenfranchised from his right to run for office in 1980. In order for him to run again for election, according to the District Cout's ruling, he would have to move into and reside in District Five. Since each school commissioner is required to have been a resident of the district which the person represents for not less than twelve months immediately preceding that person's election and shall reside in the district during the person's term of office, Alexander would have to leave his present position with the School Board in order to run for re-election in 1980.

Thus, the District Court Order as it now stands prevents Commissioner Alexander from running for re-election to the School Board at Mobile County when his term expires in 1980. (R. 790).

As stated in the following case:

> The right to seek and hold public office and to engage in political activity is a property right which is protected by the Federal Constitution. *McKinney v. Kaminsky,* 340 F. Supp. 289 (M.D. Ala. 1972).

Commissioner Alexander will lose this valuable property right to hold office if the District Court's decision is allowed to stand. In the case of *Gordon v. Leatherman*, 450 F.2d 562 (5th Cir. 1971), the Court held:

> An elected official has a property right in his office which cannot be taken away except by due process of law.

The Court in *Cowan v. City of Aspen,* 181 Colo. 343, 509 P.2d. 1269 (1973) stated:

> The right to hold public office by either appointment or election is one of the valuable and fundamental rights of citizenship.

Shortening the term of this Commissioner, by Court Order is "fundamentally unfair", "invidiously discriminatory" and "violative of due process of law".

CONCLUSION

Because of the substantial issues set forth in this "Jurisdictional Statement" involving new and novel constitutional and federal law questions, this Honorable Court should note probable jurisdiction.

Because the District Court has ordered the newly imposed single-member electoral scheme to be in effect for the primary elections to be held on September 5, 1978, the Appellants urgently and respectfully request that this Court note jurisdiction of this Appeal immediately.

Respectfully submitted,

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APPENDIX "A"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-1583

LEILA G. BROWN, et al.,

Plaintiffs-Appellees,
Cross-Appellants,

-versus-

JOHN L. MOORE, et al.,

Defendants,

ROBERT R. WILLIAMS, et al.,

Defendants-Appellants,
Cross-Appellees.

The Board of School Commissioners for the Public Schools of Mobile County, Alabama appeals from the district court's determination that the election of school commissioners on an at-large basis unconstitutionally dilutes the votes of black citizens of Mobile County. Appellants maintain that the court's order creating five single-member districts should be reversed. Plaintiffs cross appeal from the district court's decision to stagger the election of board members rather than order new elections for all five districts in 1978.

We have reviewed the district court's findings and conclusions. Judge Pittman has applied the proper

standards for evaluating plaintiff's contention that the election of school commissioners on an at-large basis dilutes the votes of black citizens and has carefully and thoroughly analyzed the record in light of these standards. On the basis of our own careful study of the record, we are convinced that the district court's findings are not clearly erroneous and that these findings amply support the conclusion that Mobile County's at-large eleciton system unconstitutionally depreciates the value of the black vote. *See Bolden v. City of Mobile*, 571 F.2d 238 (5th Cir. 1978). We further conclude that the order framed by the court below was well within the permissable scope of its equitable discretion. Accordingly, the judgment below is in all respects affirmed. The mandate shall issue forthwith.

AFFIRMED.

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, MARY LOUISE GRIFFIN, COOLEY, JOANNIE ALLEN DUMAS, ELMER JOE DAILY EDWARDS, ROSIE LEE HARRIS, HAZEL C. HILL, JEFF KIMBLE, FRANCES J. KNIGHT, JOHN W. LEGGETT, JANICE M. McAUTHOR,	)	
Plaintiffs,	)	
V.	)	CIVIL ACTION
JOHN L. MOORE, individually and in his official capacity as Probate Judge of Mobile County; JOHN E. MANDEVILLE, individually and in his official capacity as Court Clerk of Mobile County, THOMAS J. PURVIS, individually and in his official capacity as Sheriff of Mobile County; HOWARD E. YEAGER, COY SMITH, G. BAY HAAS, individually and in their official capacity as Mobile County Commissioners; ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, INDIVIDUALLY and in their official capacity as School Commissioners of Mobile County, Alabama,	)	**No. 75-298-P**
Defendants.	)	

OPINION AND ORDER AS TO THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.

This is an action brought by Leila G. Brown, and other black plaintiffs representing all Mobile County, Alabama, blacks as a class, claiming the present at-large system of electing county commissioners and school commissioners abridges the rights of the County's black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendment to the Constitution of the United States; under the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. Sec. 1973, *et seq.*

The defendants are the Board of School Commissioners of Mobile County (Board or school commissioners), Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, the Mobile County Commissioners, Howard E. Yeager, Coy Smith, G. Bay Haas, and the Probate Judge, John L. Moore, the Court Clerk of Mobile County, John E. Mandeville, and the Sheriff of Mobile County, Thomas J. Purvis, and Mobile County, who are sued individually and in their official capacities.

For purposes of clarity, a separate opinion and order will be rendered in this case against the school commissioners, et al., and the Mobile County Commissioners, et al.[1]

[1]Many of the facts and most of the law in the Board of School Commissioners and the County Commissioners are as applicable to one defendant as to the other. There are some facts and points of law which are different, particularly with reference to the law creating the different offices and the unresponsiveness of each. Because of this, separate

(continued)

The plaintiffs contend that the at-large election system, in the historical and present context of official and social racism in Alabama and Mobile County, has for all practical purposes denied black citizens equal access to participation in the countywide election of School Commissioners of Mobile County and has substantially diluted their vote.[2]

This court has jurisdiction over the claims grounded on 42 U.S.C. Sec. 1983 against the Board and over the claims grounded on 42 U.S.C. Sec. 1973 and under 28 U.S.C. Secs. 1343 (3)-(4) and 2201.

This cause was certified as a class action under Rule 23(b)(2) F.R.C.P., the plaintiff class being all black persons who are now citizens of Mobile County, Alabama.

A claim originally asserted under 42 U.S.C. Sec. 1985(3) was dismissed for failure to state a claim upon which relief can be granted.

The defendants under consideration in this portion of the case are the five school commissioners, the Probate Judge, the Court Clerk of the County, the

(footnote continued from preceding page)

opinions and orders will be rendered. A similar lawsuit against the Mobile City Commissioners, Civil Action No. 75-297-P, *Wiley L. Bolden, et al. v. City of Mobile, et al.*, was tried within weeks of this case. All three cases have been under consideration simultaneously. Many of the facts, and much of the law, in the *City* case and *County* cases are the same. Where the applicable Findings of Fact and Conclusions of Law in the two cases and with reference to the respective defendants, are substantially the same, it will be set out at length rather than referring to one or other of the three opinions and orders.

[2]The plaintiffs also contended in its complaint that the present system of electing the school commissioners "discriminates against the rural interests in the county by submerging their local strength in the countywide urban majority." Plaintiffs did not pursue this aspect of the complaint either in the offering of evidence or final arguments. The court treats this ground as abandoned.

Sheriff, and Mobile County.

The plaintiffs seek a preliminary and permanent injunction enjoining all defendants and others acting at their direction or in concert with them, of holding, supervising, or certifying the results of any election for the Board under the present at-large election system and ordering the reapportionment of the Board into racially non-discriminatory single-member districts, together with attorneys' fees and costs. (See preliminary pretrial response filed July 30, 1976.)

Plaintiffs claim that to prevail they must prove to this court's satisfaction the existence of the elements probative of voter dilution as set forth by *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd. *sub nom East Carroll Parish School Board v. Marshall*, ____ U.S. ____, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1976), contending *Zimmer* is only the adoption of specified criteria by the Fifth Circuit of the *White* dilution requirements.

The Board defendants stoutly contest the claim of unconstitutionality of the Board as measured by *White* and *Zimmer*. They claim the plaintiffs have no constitutional right to a politically safe black district and that the mere showing of adverse impact on the plaintiffs' political fortunes will not warrant the relief requested as measured by *White* and *Zimmer*.

They further contend that *Washington v. Davis*, ____ U.S. ____, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), erects a barrier since the legislative act forming the multi-member, at-large election of the Board members was without racial intent or purpose. They assert *Washington*, 96 S.Ct. at 2047-49, which was an action

alleging due process and equal protection violations, held that in these constitutional actions, in order to obtain relief, proof of *intent* or *purpose* to discriminate by the defendants must be shown. Defendants state, therefore, that since the statute under which the Board members are elected was passed when essentially all blacks were disenfranchised, there could be no intent or purpose to discriminate at the time the statue or the Constitution was adopted. Alternatively, however, defendants contend that if *Washington* does not preclude consideration of the dilution factors of *White* and *Zimmer*, they should still prevail because plaintiffs have not sustained their burden of proof under these and subsequent cases.

Plaintiffs' reply is to the effect that *Washington* did not establish any new constitutional purpose principle and that *White* and *Zimmer* still are applicable. If, however, this court finds *Washington* to require a showing of racial motivation at the time of passage of the 1919 or later statutes, plaintiffs contend they should still prevail, claiming the at-large election system was designed and is utilized with the motive or purpose of diluting the black vote. Plaintiffs claim that the discriminatory intent can be shown under the traditional tort standard.

The defendants further contend that the plaintiffs are not entitled to relief because they do not come before the court with clean hands because the plaintiffs thwarted the efforts of the Board to procure passage by the State Legislature of a constitutionally sound statute providing for single-member districts.

FINDINGS OF FACT

Mobile County, Alabama, is located in the southwestern part of the State bordered on the south by the Gulf of Mexico, on the west by the State of Mississippi, and a large portion of the county to the east by Mobile Bay. In 1970, the county's population was 317,308 with approximately 32.5% of the residents non-white. (Defendants' Exhibit No. 6, p. 1)

A 1976 estimate placed the county's population at 337,200 with approximately 32.5% of the population non-white. (Defendants' Exhibit No. 6, p. 1.) Practically all county non-whites are black. The 1970 population of the City of Mobile was 190,026 with approximately 35.4% of the residents black.[3]

The 1970 voter age population, 18 years of age and older, was 64.8% for whites and 55.2% for blacks. (Defendants' Exhibit No. 6, p. 18.) An estimate of the black vote as percentage of the total vote in the 1976 primary elections was 24.4% black of the total vote cast. (Defendants' Exhibit No. 6, p. 24.)

Almost two-thirds of the county's population resides in the City of Mobile and a large portion of the other blacks in the county reside in the adjoining municipality of Prichard. Of the 103,238 non-whites in the county, 88,890 live in Mobile and Prichard. Only 12,718 non-whites live outside the incorporated municipalities. (Defendants' Exhibit 6, p. 5.) It is obvious that the evidence relating to the City of Mobile

[3]The court takes judicial knowledge of its records. A companion case, *Bolden, et al. v. City of Mobile*, Civil Action No. 75-297-P, under consideration by the court at the same time this case was under consideration, Defendants' Exhibit No. 12, cited these figures according to the 1970 Federal Census.

elections, and other evidence relating to voter dilution in the City of Mobile are relevant in this case.

The Mobile County School System is unique in the State of Alabama. The first public school system in the State of Alabama was organized as the Mobile County System.[4]

The Constitution of 1901 preserved the integrity of this system.[5]

Most of the school systems in the rest of the State have both city and county school systems in the various counties.

The plaintiffs contend that the five member at-large scheme was the result of Act No. 498 passed on September 21, 1939, construed together with Title 52, Sec. 62, *et seq.*, *Code of Alabama* (1958) (1939, etc. Acts), which is derived from the 1927 school code. The defendants contend that these are legislative acts of *general* application and have no applicability to the Mobile County Public School System by virtue of the provisions of Sec. 270 of the Constitution of Alabama of 1901 as interpreted by the Alabama Supreme Court

[4]See *Board of School Commissioners v. Hahn*, 246 Ala. 662, 22 So.2d 91, 92, 93, for a discussion of the history and continuance of the school system in Mobile and Alabama.

[5]Article XIV, Section 270 of the Constitution of 1901:

"The provisions of this article and of any act of the legislature passed in pursuance thereof to establish, organize, and maintain a system of public schools throughout the state, shall apply to Mobile County only so far as to authorize and require the authorities designated by law to draw the portions of the funds to which said county shall be entitled for school purposes and to make reports to the superintendent of education as may be prescribed by law; and all special incomes and powers of taxation as now authorized by law for the benefit of public schools in said county shall remain undisturbed until otherwise provided by the legislature; provided, that separate schools for each race shall always be maintained by said school authorities."

in case law. The defendants contend the present existence of the school system and of the school board is provided by a *local* legislative act passed in 1919, Local Acts 1919, p. 73. In any event, there are five commissioners who run on a place-type ballot and are elected by an at-large vote of the county. There is no requirement that each commissioner reside in a particular part of the county. The commissioners are elected on a staggered basis every two years for a six year term. The defendants Probate Judge, Circuit Clerk of Mobile County, and Sheriff, or persons appointed board for election officials (Title 17, Secs. 120-26, *Code of Alabama* (1958) and as the Board of Election supervisors to certify election results. Id. Secs. 139, 139(1), 199, 209, 344).

In *Zimmer*, aff'd. *sub nom. East Carroll Parish School Board*, (" . . . but without approval of the constitutional view expressed by the court of appeals."), the Fifth circuit synthesized the *White* opinion with the Supreme Court's earlier *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971) decision, together with its own opinion in *Lipscombe v. Jonsson*, 459 F.2d 335 (5th Cir. 1972) and set out certain factors to the considered.

Based on these factors as set out in *Zimmer*, 485 F.2d at 1305, the court makes the following findings with reference to each of the primary and enhancing factors:

LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIDATE SELECTION PROCESS TO BLACKS.

Mobile County blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965.[6] It has only been since that time that significant diminution of these discriminatory practice has been made. The overt forms of many of the rights now exercised by all Mobile County citizens were secured through national legislation, federal court orders, and a moral commitment of many dedicated white and black citizens plus the power generated by the restoration of the right to vote which substantially increased the voting power of the blacks. Public facilities are open to all persons. The pervasive effects of past discrimination still substantially affects political black participation.

There are no formal prohibitions against blacks seeking office in Mobile County.[7] Since the Voting Rights Act of 1965, blacks register and vote without hindrance. The election of the school commissioners is partisan and black and whites participate in both parties. However, the court has a duty to look deeper rather than rely on surface appearance to determine if there is true openness in the process and determine whether the processes "leading to nomination and

[6] In the companion case, *Bolden v. City of Mobile*, the evidence was uncontradicted that in 1946 there were only approximately 255 black registered voters out of more than 19,000 registered voters.

[7] The qualifying fee for candidates for the city commission was found unconstitutional in *Thomas v. Mims*, 317 F. Supp. 179 (S.D. Ala. 1970). See also *U.S. v. State of Ala.*, 252 F. Supp. 95 (M.D. Ala. 1966) (three judge district court panel) (poll tax declared unconstitutional).

election [are] . . . equally open to participation by the group in question. . . . " *White*, 412 U.S. at 766. One indication that local political processes are not equally open is the fact that no black person has ever been elected to the at-large school board. This is true although the black population level is almost one-third.

In the 1960's and 1970's, there has been general polarization in the white and black voting. The polarization has occurred with white voting for white and black for black if a white is opposed to a black, or if the race is between two white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs. When this occurs, a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks.

Since 1962, four black candidates have sought election in the at-large county school board election. Dr. Goode in 1962, Dr. Russell in 1966, Ms. Jacobs in 1970, and Ms. Gill in 1974. All of these black candidates were well educated and highly respected members of the black community. They all received good support from the black voters and virtually no support from whites. They all lost to white opponents in run-off elections.

Three black candidates entered the race of the Mobile City Commission in 1973. Ollie Lee Taylor, Alfonso Smith, and Lula Albert. They received modest support from the black community and virtually no support from the white community. They were young, inexperienced, and mounted extremely limited campaigns.

Two black candidates sought election to the Alabama State Legislature in an at-large election in 1969. They were Clarence Montgomery and T.C. Bell. Both were well supported from the black community and both lost to white opponents.

Following a three-judge federal court order in 1972[8] in which single-member districts were established and the house and senate seats reapportioned, one senatorial district in Mobile County had an almost equal division between the black and white population. A black and white were in the run-off. The white won by 300 votes. There were no overt acts of racism. Both candidates testified and asserted each appealed to both races. It is interesting to note that the white winner published a simulated newspaper with both candidate's photographs appearing in the front page, one under the other, one white, one black.

One city commissioner, Joseph N. Langan, who served from 1953 to 1969, had been elected and reelected with black support until the 1965 Voting Rights Act enfranchised large numbers of blacks. His reelection campaign in 1969 foundered mainly because of the fact of the backlash from the black support and his identifidation with attempting to meet the particularized needs of the black people of the city. He was again defeated in an at-large county commission race in 1972. Again the backlash because of the black support substantially contributed to his defeat.

In 1969, a black got in a run-off against a white in an at-large legislature race. There was an agreement between various white prospective candidates not to run or place an opponent against the white in the run-

[8] *Sims v. Amos*, 336 F. Supp. 924 (M.D. Ala. 1972).

off so as not to splinter the white vote. The white won and the black lost.

Particularly all active candidates for public office testified it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected against a white. Most of them agreed that racial polarization was the basic reason. The plaintiffs introduced statistical analyses known as "regression analysis" which supported this view. Regression analysis is a professionally accepted method of analyzing data to determine the extent of correlation between dependent and independent variables. In plaintiffs' analyses, the dependent variable was the vote received by the candidates studied. Race and income were the independent variables whose influence on the vote received was measured by the regression. There is little doubt that race has a strong correlation with the vote received by a candidate. These analyses covered every city commission race in 1965, 1969, and 1973, both primary and general election of county commission in 1968 and 1972, and selected school board races in 1962, 1966, 1970, 1972, and 1974. They also covered referendums held to change the form of city government in 1963 and 1973 and a countywide legislative race in 1969. The votes for and against white candidates such as Joe Langan in an at-large city commission race, and Gerre Koffler, at-large county school board commission, who were openly associated with black community interests, showed some of the highest racial polarization of any elections.

Since the 1972 creation of single-member districts, three blacks have been elected. Their districts are more

heavily populated with blacks than whites.

Prichard, an adjoining municipality to Mobile, which in recent years has obtained a black majority population, elected the first black mayor and first black councilman in 1972.

Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life. This fact is shown by the removal of such a barrier, i.e., the disestablishment of the multi-member at-large elections for the state legislature. New single member districts were created with racial compositions that offer blacks a chance of being elected, and they are being elected.

The court finds that the structure of the at-large election of school commissioners combined with strong racial polarization of the county's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process.

UNRESPONSIVENESS OF THE ELECTED SCHOOL COMMISSIONERS OF MOBILE COUNTY TO THE BLACK MINORITY

The at-large elected county board members have not been responsive to the minorities' needs, who

constitute 32.5% of the total population.

The Mobile County School System maintained a dual school system which prolonged segregation until sometime after *Davis v. Board of School Commissioners of Mobile County*, Civil Action No. 3003-63-H, was commenced in this court in 1963. The lengthy record in *Davis, supra*, is devastating evidence of the complete unresponsiveness and resistance on the part of the Board to the particularized needs and aspirations of the black community.

This record (the docket sheet itself comprises some 27 pages. See Plaintiffs' Exhibit No. 99.) is replete with dilatory actions by the Board attempting to forestall the implementation of a desegregated school system. Another judge of this court was put in a position of having to compel the school Board to desegregate the school system against the Board's adamant refusal to respond voluntarily to black community interests and the prevailing law of the land. The record shows that on numerous occasions the court, faced with the complete failure of the Board to cooperate, had the unpleasant task of forcing the Board to carry out its lawful directives.

The Board usually acted only in response to numerous restraining and injunctive orders by the court. This occurred over a period of time covering more than a decade of litigation. The restraining orders were all of the same import, to wit, that the School Board follow the law as required by the Constitution.

> "The defendant, Board of School Commissioners of Mobile County and the other individual defendants . . . , be and they are hereby restrained and *enjoined from requiring and permitting segregation of the races* in any school under their supervision from and after such time as may be necessary to make arrangements for admission of children to such school on a racially non-discriminatory basis with all deliberate speed, as required by the Supreme Court in *Brown v. Board of Education of Topeka*, 1954, 349 I.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083." (Emphasis added.)[9]

> "It is ORDERED, ADJUDGED and DECREED that the *defendants*, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently *enjoined from discriminating* on the basis of race or color in the operation of the school system. *** [T]hey *shall take affirmative action to disestablish* all school segregation and to eliminate the effects of the dual school system." (Emphasis added.)[10]

The utter frustration of the court over the repeated failure of the School Board to make a good faith effort to carry out its duties as to all of the students in the system was well articulated in an order of August 1, 1969 (M.E. No. 25,826), wherein the court stated:

> "With *eight years of litigation* entailing countless days and weeks of hearings in court, it has been clearly established that the Mobile County School *System must* forthwith *be operated in accordance with the law* of the land. What this school system needs is to educate children legally, and not engage in protracted litigation. After all, the children are

[9]Order of July 11, 1963, M.E. No. 15,289.

[10]Order of April 7, M.E. No. 25,342. See also:

1. M.E. No. 15,555, dated 9/9/63
2. M.E. No. 25,274, dated 3/27/69
3. M.E. No. 26,553, dated 1/28/70
4. M.E. No. 27,705, dated 9/14/70

the ones in whom we should be most interested." (Emphasis added.)

On March 16, 1970, this same judge, faced with the failure of the Board to carry out certain orders of this court entered pursuant to directives of the Fifth Circuit following rulings of the Supreme Court of the United States, entered an order which stated in pertinent part:

> "The School Board is required to follow the *order* of this court of January 31, 1970, as amended and if the same is *not followed* within three days from this date, a *fine of $1,000 per day* is hereby assessed for each such day, against each member of the Board of School Commissioners."[11] (Emphasis added.)

The Fifth Circuit has, in its numerous orders and opinions,[12] noted with displeasure, the total lack of

[11] M.E. No. 26,771, dated 3/16/70.

[12]
I. *Davis v. Bd. of School Comm. of Mobile County*, 318 F.2d 63 (1963)
II. *Davis*, 322 F.2d 356 (1963), cert. den. 375 U.S. 894, 84 S. Ct. 170, 11 L.Ed.2d 123; reh. den. 376 U.S. 928, 84 S. Ct. 656, 11 L.Ed.2d 628.
III. *Davis*, 333 F.2d 53 (1964), cert. den. 379 U.S. 844, 85 S. Ct. 85, 13 L.Ed.2d 49.
IV. *Davis*, 364 F.2d 896 (1966)
V. *Davis*, 393 F.2d 690 (1968)
VI. *Davis*, 414 F.2d 609 (1969)
VII. *Singleton v. Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (1969)
VIII. *Davis*, 422 F.2d 1139 (1970)
IX. *Davis*, 430 F.2d 883 (1970); on remand 430 F.2d 889; aff. in part, rev. in part, 402 U.S. 33, 91 S. Ct. 1289, 28 L.Ed.2d 577
X. *Davis*, 483 F.2d 1017 (1973)
XI. *National Education Ass. v. Board of School Comm. of Mobile County*, 483 F.2d 1022 (1973)
XII. *Davis*, 496 F.2d 1181 (1974)
XIII. *Davis*, 517 F.2d 1044 (1975)
XIV. *Davis*, 526 F.2d 865 (1976)

cooperation exhibited by the Board. In *Davis II* (see n. 12, *supra*), it was stated:

> "Although it seems to be acknowledged on all hands that a *racially segregated system* is still *maintained*, the Defendants' legal position*** is that Plaintiffs have not set forth a claim entitling them to relief. So far as this record shows, the *Defendant* school authorities have *not* to this day ever *acknowledged* that (a) the present system is constitutionally invalid or (b) that there is any obligation or their part to make any changes at any time." 322 F.2d at p. 358. (Emphasis added.)

In *Davis IV* (See n. 12, *supra*), the court said:

> ". . . [I]t must also be borne in mind that this school *board ignored for nine years* the requirement clearly stated in Brown that the School authorities have the primary responsibility for solving this constitutional problem." 364 F.2d at 898, n. 1. (Emphasis added.)

In *Davis V* (see n. 12, *supra*), the Fifth Circuit stated, through Judge Thornberry:

> "In the last Mobile case, Judge Tuttle said *there must 'be an end to* the present policy of hiring and assigning teachers according to race by the time the last of the schools are fully desegregated for the school year 1967-68.' 364 F.2d at 904. . . . [D]espite the court's decree, it seems apparent that the policy of hiring and *assigning teachers according to race* still exists.*** The reason for the lack of progress is that the board has not yet shouldered the burden." 393 F.2d at 695 (Emphasis added.)

Further evidence is contained in *Davis IX* (see n. 12, *supra*), where, on page 886, it is stated:

> "The Mobile County School *System has* almost *totally failed to comply* with the faculty ratio

requirement although ordered to do so by the district court on August 1, 1969." (Emphasis added.)

Further, it was pointed out in note 4 thereof, in discussing desegregation plans:

> "... but the *defendants*, the only parties in possession of current and accurate information, have *offered no help*. This lack of cooperation and generally *unsatisfactory* condition created by defendants, should be terminated at once by the district court." 430 F.2d at p. 888. (Emphasis added.)

There are, to date, many unresolved controversies remaining in *Davis*. There is no doubt that with a more cooperative School Board making a more responsive effort to conform to the law, the process of implementing a constitutionally acceptable unitary school system would have been accomplished faster and without the divisiveness, and lengthy and expensive litigation already experienced.

Today, thirteen years after the filing of the *Davis* case, the Board is operating under "A Comprehensive Plan for a Unitary School System" order of this court issued pursuant to a mandate of the Supreme Court of the United States and of the Fifth Circuit Court of Appeals. Under these circumstances, the defendants can justly claim little credit for this alleged responsiveness today to black needs.

THERE IS NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS.

There is no clear cut *State* policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole. The lack of State policy therefore must be considered as a neutral factor.

In considering the State policy with specific reference to Mobile, the Mobile County School System was established in 1826, the first provision for a "public" school system in the State.[13] The commissioners were to be elected at-large. In 1854, the first general public school system for the State of Alabama was enacted.[14] Section 2 of Article VI of that Act recognized and maintained the Mobile County School System separate and apart from the school system for the State. This was incorporated in the Constitution of 1875 and the Constitution of 1901, Sec. 270 of Article XIV. The at-large election of the Mobile County School Commissioners has continued to the present time. The manifest policy of Mobile County has been to have at-large or multi-member districting.

PAST RACIAL DISCRIMINATION.

Prior to the Voting Rights Act of 1965, there was effective discrimination which precluded effective

[13] Acts of Alabama, 1825-26, p. 35. This Act provided for not less than thirteen nor more than twenty-five commissioners.

[14] Acts of Alabama, 1853-54, p. 8.

participation of blacks in the elective system in the State, including Mobile County.

One of the primary purposes of the 1901 Constitutional Convention of the State of Alabama was to disenfranchise the blacks. The Convention was singularly successful in this objective. The history of discrimination against blacks' participation, such as the cumulative poll tax, the restrictions and impediments to blacks registering to vote, is well established.

Local discrimination in the city and the county has been established in connection with the lawsuits concerning racial discrimination arising in this court, to wit, *Allen v. City of Mobile*, 331 F. Supp. 1134, (S/D Ala. 1971, aff'd. 466 F.2d 122 (5th Cir. 1972), cert. den. 412 U.S. 909 (1973); *Anderson v. Mobile County Commission*, Civil Action No. 7388-72-H (S/D Ala. 1973); *Sawyer v. City of Mobile*, 208 F. Supp. 548 (S/D Ala. 1961); *Evans v. Mobile City Lines, Inc.*, Civil Action No. 2193-63 (S/D Ala. 1963); and *Cooke v. City of Mobile*, Civil Action No. 2634-63 (S/D Ala.). *Preston v. Mandeville*, 479 F.2d (5th Cir. 1973), was a countywide case involving racial discrimination of Mobile's jury selection practices. *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987 (1944) (white primaries) was applicable to Alabama and some Alabama cases of discrimination are *Davis v. Schnell*, 81 F. Supp. 872 (S/D Ala. 1949), aff'd 336 U.S. 933, 69 S.Ct. 749, 93 L.Ed. 1093 (1949), ("interpretation" tests for voter registration), *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering of local government), *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506

(1964) (racial gerrymandering of state government), and *U.S. v. Alabama*, 252 F. Supp. 95 (M/D Ala. 1966) (Alabama poll tax).

The racial polarization existing in the city and county elections has been discussed herein. The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners.

In the 1950's and early sixties, prior to the Voting Rights Act of 1965, only a relatively small percentage of blacks were registered to vote in the county.[15] Since the Voting Rights Act, the blacks have been able to register to vote and become candidates.

ENHANCING FACTORS

With reference to the enhancing factors, the court finds as follows:

(1) The countywide election encompasses a large district. Mobile County has an area of 1,240 square miles with a population of 317,308 in 1970 and an estimated population of 337,200 in 1976.

(2) There is a majority vote requirement for the school commissioners in the primaries.

(3) There is no anti-single shot voting provision but

[15]In the 1950's and 1960's, the impediments placed in the registration of the blacks to vote were not as aggravated in Mobile County as in some counties. It was not necessary for voter registrars to be sent to Mobile to enable blacks to register. However, as previously noted, in 1946 only 255 blacks out of over 19,000 voters were registered.

the candidates run for positions by place or number.[16]

(4) There is a lack of provision for the at-large candidates to run from a particular geographical sub-district, as well as a lack of residence requirement.

The court concludes that in the aggregate, the at-large election structure as it operates in the countywide election of the school commissioners of Mobile County substantially dilutes the black vote in these elections.

CONCLUSIONS OF LAW

I.

The court addresses itself first to the contention of the defendants that the plaintiffs are not entitled to relief because they do not come before the court with clean hands because they thwarted the efforts of the school commissioners to procure passage by the State Legislature of a *constitutionally* sound statute pending in the 1976 legislature providing for reapportionment of the Board into five single-member districts. These defendants further contend that the Legislature has demonstrated a willingness to pass a constitutionally sound statute providing for reapportionment of the school board into five single-member districts and that this function should be left to the Legislature.

The complaint in this cause was filed in June of 1975.

[16]The influence of this enhancing factor is minimal. It is this writer's opinion, born out of 15 years experience in a State judicial office subject to the electoral process, that the public's best interest is served, and it can make more intelligent choices, when candidates run for numbered positions. The choices between candidates are narrowed for the voter and they can be compared head to head.

The State Legislature in the summer months of 1975 passed a *local* act reapportioning the Board membership into five single-member districts which these defendants claim they supported. The Board members were dismissed as parties defendant. Shortly thereafter, these defendants sought a declaratory judgment in the State court as to whether or not the local act was constitutional. The State court declared the act was fatally defective because of the manner in which the act was published.[17]

On March 8, 1976, the plaintiffs sought and received leave to add the Board members as parties defendant by an amended complaint. These defendants were served March 19, 1976. They failed to plead. On July 12, the plaintiffs filed a motion for a default judgment. On that date, the Board members filed an answer and responded to the motion for default judgment. The case was set for trial July 19, 1976. It was continued at

[17]Article IV, Sec. 106 of the Constitution of 1901:

> "Sec. 106. No special, private, or local law shall be passed on any subject not enumerated in section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof by affidavit that said notice has been given shall be exhibited to each house of the legislature, and said proof spread upon the journal. The courts shall pronounce void every special, private, or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

the request of these defendants.[18] The case was reset for trial September 9, 1976. On September 2, 1976, these defendants filed a motion to sever and to dismiss or continue.[19] On September 9, 1976, these defendants filed a motion to stay pending certification for interlocutory appeal and a motion to stay pending appeal, all of which were denied. Beginning with these defendants' response to motion for default judgment and in connection with other motions herein mentioned, these Board members have contended they were making a good faith effort to get a *constitutionally sound legislative* enactment passed in the 1976 Legislature but the plaintiffs blocked passage of the bill. They sought a continuance until the legislature meets again in 1977 to give that legislature an opportunity to pass a constitutionally sound bill dividing the school board into five single-member districts. Although the language varied in motion to motion and document to document, the thrust of each motion was that single-member districts could be provided for by the legislature. The September 2 motion to sever and dismiss and continue by these defendants used this language:

> "Despite the efforts of these defendants, the bill was not passed into law but was blocked by the negative votes of three members of the Mobile County legislative delegation."

all of whom were black and within the plaintiff class. On the last page of the motion, this language was used:

> "And the Board of School Commissioners of

[18]See "Appendix A."

[19]See n. 18, *supra*, "Appendix A."

> Mobile County can be reapportioned into five single member districts meeting all *constitutional* standards by the *normal legislative* process. . . ." (Emphasis added.)

The same, or substantially the same language was used in the September 9 motion for a stay pending appeal. In a proposed Findings of Fact and Conclusions of Law prepared by these defendants in pursuance of this court's pretrial order, on the last two pages this language was used:

> "The Legislature of the State of Alabama has demonstrated its willingness, without intervention by this court, to provide a constitutionally sound system of governance for the Mobile County Public School System. . . ."

and

> ". . . plaintiffs have on at least one occasion blocked the good faith efforts to the defendant School Board to procure passage by the State Legislature of a *constitutionally* sound *statute* providing for reapportionment of the School Board into five single-member districts." (Emphasis added.)

In a trial memorandum of these defendants, page 26, it was stated:

> ". . . it is entirely clear that the legislative remedy is available."

This brief was filed September 2.

The evidence before the court indicated that the black legislators from this county became concerned with whether or not the proposed act pending in the 1976 legislature would be constitutionally sound. During closing arguments in this cause, the provisions

of the 1901 Constitution, Sec. 270[20] were discussed. The court directed an inquiry to counsel for these defendants whether or not it was his contention and belief that the at-large system could be constitutionally changed by the bill pending in the 1976 legislature. He answered no because the bill was a *general* bill, citing Alabama Supreme Court authorities, which he contended supported his position. This was the first notice the court had that the legal position of counsel for these defendants was that the single-member district bill as drafted and presented to the 1976 legislature could not be constitutionally enacted. In the post-trial memorandum filed by these defendants September 29, 1976, p. 4, it was stated:

> ". . . and *general* Acts of the Legislature relating to school matters have no applicability to the Mobile County Public School system by virtue of the provisions of §270 of the Constitution of Alabama of 1901." (Emphasis added.)

These defendants had persistently contended the 1976 bill was the same as the 1975 Act. It was not. According to these defendants now, there is a vital difference. The 1975 Act was a *local* act, the proposed 1976 Act was a *general* act. These developments explode these defendants' contention that the plaintiffs do not come into court with clean hands. Clearly, these defendants were trying to place the shoe on the wrong foot. The court takes judicial notice of the lack of cooperation and dilatory practices of the School Board in the past in the *Birdie Mae Davis* case.

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[20]See n. 5, *supra*.

II.

There is a threshold question faced by this court in whether or not *Washington v. Davis*, ____ U.S. ____, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), is dispositive of this case so as to preclude an application of the factors determinative of voter dilution as set forth in *White* and *Zimmer*, aff'd. *sub nom. East Carroll Parish School Board*.

It is defendants' contention that *Washington* makes it clear that to prevail the plaintiffs must prove that the statute establishing the at-large election was *adopted* with a discriminatory *purpose*. They assert that the present existence of the five member Board and their at-large election on a staggered basis every two years is provided for by a *local* Act enacted in 1919, and at that time blacks were disenfranchised. If the court accepted the plaintiffs' contention that the 1939, etc. Acts, *general* acts, are the statutes the Board is operating under, it would make no difference because the blacks were effectively disenfranchised at the time of those enactments. Therefore, this court need not determine the Alabama constitutional question, to wit, does it take a *local* act or a constitutional amendment to change the present make-up of the Board and the manner by which they are elected. It is reasoned in either event that the at-large system of electing school commissioners when adopted had no relation to minimizing or diluting the black vote because there was none.

The plaintiffs contend that *Washington did not establish a new Supreme Court purpose* test.

The thrust of the defendants' argument is that if the

1919 statute (or by implication, the 1939, etc. Acts) creating the present Board and their election at-large was neutral on its face *Washington does not* permit this court to consider other evidence or factors and must decide for the school commissioners. It is argued that *Washington* is a benchmark decision requiring this finding in the multi-member at-large school commissioners' election.

The school commissioners contend the board membership and at-large election was provided for by either of these statutes enacted during a period of time when the blacks were substantially disenfranchised in the State of Alabama. One of the purposes of the 1901 Constitutional Convention was to disenfranchise the blacks.[21]

The court, therefore, will proceed to examine *Washington* on the proposition that the present school board membership and at-large election was provided for by either the 1919 or 1939, etc. Acts of the Legislatures.

Washington upheld the validity of a written personnel test administered to prospective recruits by the District of Columbia Police Department. It had been alleged the test "excluded a disportionately high number of Negro applicants." *Id.* at 2044. The petitioners claimed the effect of this disportionate

[21]The history of Alabama indicates that there was a populist movement at that time which sought to align the blacks and the poor whites. The Bourbon interest of the State sought to disenfranchise the poor whites, along with the blacks, but were unsuccessful, excepting the cumulative feature of the poll tax. They were singularly successful disenfranchising the blacks. The 1901 Constitution had this provision about the Mobile school system: ". . . provided, that separate schools for each race shall always be maintained by said school authorities." N. 5, *supra*.

exclusion violated their Fifth Amemdment due process rights and 42 U.S.C. §1981. *Id.* at 2044. Evidence indicated that four times as many blacks failed to pass the test as whites. Plaintiffs contended the impact in and of itself was sufficient to justify relief. They made no claim of an intent to discriminate. The District Court found no intentional conduct and refused relief. The Circuit Court reversed, relying upon *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). *Griggs* was a Title VII action (42 U.S.C. §2000e, *et seq.*) in which the racially discriminatory impact of employment tests resulted in their invalidation by the court.

The Supreme Court in *Washington* reconciled its decision with several previous holdings, distinguished some, and expressly overruled some cases in which there were possible conclusions different from *Washington*.

They made *no reference to the recent pre-Washington* cases of its or appellate courts' voting dilution decisions dealing with at-large or multi-member versus single-member districts, and, in particular, no mention was made of the cardinal case in this area, *White v. Regester*, 421 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314, (1973), nor to *Dallas v. Reese*, 421 U.S. 477, 95 S.Ct. 1706, 44 L.Ed.2d 312, (1975), and *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975), nor to *Zimmer*, which the Court had affirmed only a few months before, nor to *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1975). No reference was made to *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965), to *Reynolds*, nor to *Whitcomb*. *Whitcomb*, 403 U.S. at 143, recognized

that in an at-large election scheme, a showing that if in a particular case the system operates to minimize or cancel out the voting strength of racial or political elements, the courts can alter the structure. Had the Supreme Court intended the *Washington* case to have the far reaching consequences contended by defendants, it seems to this court reasonable to conclude that they would have made such an expression.

There are several reasons which may be plausibly advanced as to why the *Washington* Court did not expressly overrule nor discuss these cases. Courts are not prone to attempt to decide every eventuality of a case being decided or its effect on all previous cases. The Court may have desired that there be further development of the case law in the district and circuit courts before commenting on the application of *Washington* to this line of cases. The cases may be distinguishable and reconcilable with the expressions in *Washington*. Or, it may not have been the intention of the *Washington* Court to include these cases within the ambit of its ruling.

Washington spoke with approval of *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), reh. den. 376 U.S. 959, 84 S.Ct. 964, 11 L.Ed.2d 977, setting out the "intent to gerrymander" requirement established in *Wright*. *Washington*, at 2047-48.

Wright was the direct descendant of *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960). These two cases involved racial gerrymandering of political lines. *Gomillion* dealt with an attempt by the Alabama legislature to exclude most black voters from the municipal limits of Tuskegee wo whites could

control the election. The court found that the State of Alabama impaired the voting rights of black citizens while cloaking it in the garb of the realignment of political subdivisions and held there was a violation of the Fifteenth Amendment. *Gomillion*, at 345. There was no direct proof of racial discriminatory intent. Justice Stevens in his concurring opinion noted with approval, " . . . when the disproportion[ate impact] is as dramatic as in *Gomillion* . . . , it really does not matter whether the standard is phrased in terms of *purpose or effect*." *Washington*, at 2054.[22] (Emphasis added.)

Wright dealt with the issue of congressional redistricting of Manhattan. The plaintiffs alleged racially motivated districting. The congressional lines drawn created four districts. One had a large majority of blacks and Puerto Ricans. The other three had large white majorities. The court held the districts were not unconstitutionally gerrymandered upon the finding that " . . . the New York legislature was [not] motivated by racial considerations or in fact drew the districts on racial lines." *Wright*, 376 U.S. at 56. This set forth the principle that in gerrymandering cases in order for the plaintiffs to obtain relief they must show racial motivation in the drawing of the district lines.

Washington then quoted with approval from *Keyes*

[22]In *Paige v. Gray*, 538 F.2d 1108 (5th Cir. 1976), black citizens of Albany, Georgia, brought an action to invalidate the at-large system of electing city commissioners. At 1110, n.3, the court noted the above quote by Justice Stevens, but in the body of the opinion expressed concern with unlawful motive for discriminatory purpose as required by *Washington*. However, at 1110, the court stated "the validity of Albany's change from a ward to an at-large system can best be handled by applying the multifactor test enunciated in . . . *White v. Regester* . . . and *Zimmer v. McKeithen*." *Paige*, at 1111, stated *Zimmer* still "sets the basic standard in this circuit."

v. School District No. I, 413 U.S. 189, 93 S.Ct. 2686, 37 L.ED.2d 548 (1973), indicating a distinction or reconciliation of that case with *Washington*. There had not been racial purpose or motivation *ab initio* in *Keyes*. *Keyes* was a Denver, Colorado, school desegregation case. Denver schools had never been segregated by force of state statute or city ordinance. Nevertheless, the majority found that the *actions* of the School Board during the 1960's were sufficiently indicative of " . . . [a] purpose or intent to segregate" and a finding of *de jure* segregation was sustained. *Keyes*, at 205, 208. That court held that to find overt racial considerations in the *actions* of government officials is indeed a difficult task.[23]

Washington further commented:

> ". . . an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington*, 96 S.Ct. at 2049.

The plaintiffs contend that *Washington's* discussion with approval of the *Keyes* case permits the application of the "tort" standard in proving intent. In his concurring opinion, Justice Stevens discussed this point:

> "Frequently the most probative evidence of intent will be objective evidence of what actually

[23]In another Fifth Circuit case it was held that if an official is motivated by such wrongful intent, he or she

> ". . . will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct . . . play no small part." *U.S. v. Texas Ed. Agency*, 532 F.2d 380, 388, (5th Cir. 1976) (Austin II) (school desegregation).

> happened rather than evidence describing the subjective state of mind of the actor. For *normally the actor is presumed to have intended the natural consequences of his deeds*. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed motivation." *Washington*, 96 S.Ct. at 2054. (Emphasis added.)

The plaintiffs contend this circuit's use of the tort standard of proving intent squares with the above statements. This circuit for several years has accepted and approved the tort standard as proof of segregatory intent as a part of state action in school desegregation findings. *Morales v. Shannon*, 516 F.2d 411, 412-13 (5th Cir. 1975), *cert. den.* 423 U.S. 1034 (1975).

Recently, citing *Morales, supra, Cisneros v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. den.* 413 U.S. 920 (1973), reh. den. 413 U.S. 922 (1973), and *United States v. Texas Educational Agency*, 467 F.2d 848 (5th Cir. 1972) (en banc) (Austin I), the Fifth Circuit in *U.S. v. Texas Education Agency*, (Austin Independent School District) 532 F.2d 380 (5th Cir. 1976) (Austin II) squarely addressed the meaning of discriminatory intent in the following language:

> "Whatever may have been the originally intended meaning of the test we applied in *Cisneros* and *Austin I* [*U.S. v. Texas Education Agency, supra,*] we agree with the intervenors that, after *Keyes*, our two opinions must be viewed as incorporating in school segregation law the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions.
>
> * * *

> "Apart from the need to conform *Cisneros* and *Austin I* to the supervening *Keyes* case, there are other reasons for attributing responsibility to a state official who should reasonably foresee the segregation effects of his actions. First, it is difficult—and often futile—to obtain direct evidence of the official's intentions. . . . Hence, courts usually rely on circumstantial evidence to ascertain the decision-makers' motivation." *Id.* at 388.

This court in its findings of fact has held that when the 1919 statute and the 1939, etc. Acts were enacted, the blacks were disenfranchised and here concludes the statutes on their respective faces were neutral. This is in line with Fifth Circuit opinions, *McGill v. Gadsden Co. Commission*, 535 F.2d 277 (5th Cir. 1976), *Wallace v. House*, 515 F.2d at 633 (5th Cir. 1975), vacated ____ U.S. ____, 96 S.Ct. 1721, 48 L.Ed.2d 191 (1976). No. 74-2654 (5th Cir. Sept. 17, 1976), affirmed the District Court and *Taylor v. McKeithen*, 499 F.2d 893, 896 (5th cir. 1974). However, in the larger context, the evidence is clear that one of the primary purposes of the 1901 constitutional convention was to disenfranchise the blacks.

Therefore, the legislature in 1919 and 1939, etc. Acts was acting in a race-proof situation. There can be little doubt as to what the legislature would have done to prevent the blacks from effectively participating in the political process had not the effects of the 1901 constitution prevailed. The 1901 constitution and the subsequent statutory schemes and practices throughout Alabama, until the Voting Rights Act of 1965, effectively disenfranchised most blacks.

A legislature in 1919, little more than 50 years after a

bitter and bloody civil war which resulted in the emancipation of the black slaves, or a legislature in 1939, etc., should have reasonably expected that the blacks would not stay disenfranchised. It is reasonable to hold that the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large election system imposed.

Under Alabama law, the legislature is responsible for passing acts modifying the form of city and county governments. Mobile County elects or has an effective electoral voice in the election of eleven members of the House and three senators. The state legislature observes a courtesy rule, that is, if the county delegation unanimously endorses local legislation, the legislature perfunctorily approves all local county legislation. The Mobile County Senate delegation of three members operates under a courtesy rule that any one member can veto any local legislation. If the Senate delegation unanimously approves the legislation, it will be perfunctorily passed in the State Senate. The county House delegation does not operate on an unanimous rule as in the Senate, but on a majority vote principle, that is, if the majority of the House delegation favors local legislation, it will be placed on the House calendar but will be subject to debate. However, the proposed county legislation will be perfunctorily approved if the Mobile County House delegation unanimously approves it. The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to the black voters

passing until the State was redistricted by a federal court order.[24] There are now three blacks on the eleven member House legislative delegation. This resulted in passage in the 1975 legislature of a bill doing away with the at-large election of the County Board of School Commissioners and creating five single-member districts. This was promptly attacked by the all-white at-large elected County School Board Commission in the State court. The act was declared unconstitutional.

This natural and foreseeable consequence of the 1919 Act, or the 1939, etc. Acts, black voter dilution, was brought to fruition in a few years, the middle 1960's, and continues to the present. This court sees no reason to distinguish a school desegregation case from a voter discrimination case. It appears to this court that the evidence supports the tort standard as advocated by the plaintiffs. However, this court prefers not to base its decision on this theory. This court deems it desirable to determine if the far-reaching consequences of *Washington* as advanced by the defendants is correct without regard to *Keyes*. This court is unable to accept such as broad holding with such far-reaching consequences.

The case *sub judice* can be reconciled with *Washington*. The *Washington* Court, in Justice White's majority opinion, included the following:

> "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886)." *Washington*, 96 S.Ct. at 2048.

[24] *Sims v. Amos*, 336 F. Supp. 924 (M/D Ala. 1972).

To hold that the 1919, or 1939, etc. Acts while facially neutral would defeat rectifying the invidious discrimination on the basis of race which the evidence has shown in this case would fly in the face of this principle.

It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an "unequal application of the law . . . as to show intentional discrimination." *Atkins v. Texas*, 325 U.S. 398, 404, 65 S.Ct. 1276, 89 L.Ed. 1692 (1945) and the deliberate systematic denials to people from juries because of their race, *Carter v. Jury Commission, Cassell v. Texas, Patton v. Mississippi*, cited in *Washington*, at 2047, to a present purpose to dilute the black vote as evidenced in this case. There is a "current" condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes*. *Washington*, at 2048.

More basic and fundamental than any of the above approaches is the factual context of *Washington* and this case. Initial discriminatory purpose in employment and in redistricting is entirely different from resulting voter dilution because of racial discrimination. *Washington's* failure to expressly overrule or comment on *White, Dallas, Chapman, Zimmer, Turner, Fortson, Reynolds,* or *Whitcomb*, leads this court to the conclusion that *Washington* did not overrule those cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination.

III.

In order for this court to grant relief as prayed for by plaintiffs, it must be shown that the political process was not open equally to the plaintiffs as a result of dilution of voting strength and consequently the members of the class had less opportunity to participate in the political process and elect representatives of their choice. *Chapman*, 420 U.S. at 18, and *Whitcomb*. "Access to the political process and not [the size of the minority] population" is the key determinant in ascertaining whether there has been invidious discrimination so as to afford relief. *White*, 412 U.S. at 766; *Zimmer*, 483 F.2d at 1303.

The idea of a democratic society has since the establishment of this country been only a supposition to many citizens. The Supreme Court vocalized this realization in *Reynolds* where it formulated the "one person-one vote" goal for political elections. The precepts set forth in *Reynolds* are the sub-structure for the present voter dilution cases, stating that "every citizen has an inalienable right to full and effective participation in the political processes. . . ." *Reynolds*, 377 U.S. at 565. The Judiciary in subsequent cases has recognized that this principle is violated when a particular identifiable racial group is *not* able to fully and effectively participate in the political process because of the system's structure.

Denial of full voting rights range from outright refusal to allow registration, *Smith*, to racial gerrymandering so as to exclude persons from voting in a particular jurisdiction, *Gomillion*, to establishing or maintaining a political system that grants citizens all

procedural rights while neutralizing their political strength, *White*. The last arrangement is maintained by the countywide at-large election of school commissioners.

Essentially, dilution cases revolve around the "quality" of representation. *Whitcomb*, 403 U.S. at 142. The touchstone for a showing of unconstitutional racial voter dilution is the test enunciated by the Supreme Court in *White*, 421 U.S. at 765: "Whether multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups." In *White*, for slightly different reasons in each county, the Supreme Court found that the multi-member districts in Dallas and Bexar Counties, Texas, were minimizing black and Mexican-American voting strength.

Attentive consideration of the evidence presented at the trial leads this court to conclude that the present at-large countywide election of school commissioners impermissibly violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process. *White*, 412 U.S. at 766; *Whitcomb*, 403 U.S. at 143. The plaintiffs have discharged the burden of proof as required by *Whitcomb*.

This court reaches its conclusion by collating the evidence produced and the law propounded by the federal appellate courts. The controlling law of this Circuit was enunciated by Judge Gewin in *Zimmer*, which closely parallels *Whitcomb* and *White*.[25] The *Zimmer* court, in an *en banc* hearing, set forth four primary and several "enhancing" factors to be considered when resolving whether there has been

[25]See also *Paige v. Gray*, 538 F.2d 1108 (5th Cir. 1976).

impermissable voter dilution. The primary factors are:

> ". . . a lack of access to the process of slating candidates, the unresponsiveness of legislators particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case [for relief] is made." *Zimmer* at 1305. [footnotes omitted].

The enhancing factors include:

> "a showing of the existence of large districts majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Zimmer* at 1305 [footnotes omitted].

1. LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIDATE SELECTION PROCESS TO BLACKS.

Any person interested in running for school commissioner is able to do so.

The system at first blush appears to be neutral, but consideration of facts beneath the surface demonstrate the *effects* which lead the court to conclude otherwise. No black has ever been elected school commissioner in Mobile County. The evidence indicates that black politicians who have previously been candidates in at-large elections and would run again in the smaller single-member districts, shy away from county at-large elections. One of the principal reasons is the polarization of the white and black vote. The court is concerned with the effect of lack of openness in the

electoral system in determining whether the multi-member at-large election system of the school commissioners is invidiously discriminatory.

In *White*, the Supreme Court expressed concern with any type of barrier to effective participation in the political process. *Zimmer*, 485 F.2d at 1305, n. 20, expressed its view in this language: "The standards we enunciate today are applicable whether it is a specific law or custom or practice which causes diminution of a minority voting strength."

There is a lack of openness to blacks in the political process in the school commissioners' election.

2. UNRESPONSIVENESS OF THE ELECTED SCHOOL COMMISSIONERS OF MOBILE COUNTY TO THE BLACK MINORITY.

It is the conclusion of the court that the countywide elected school commissioners as practiced in Mobile County has not, and is not, responsive to blacks on an equal basis with whites; hence there exists racial discrimination. Past school boards have not only acquiesed to segregated folkways, but the County School Board has been in federal court continuously since 1963 to effect meaningful desegregation. *Davis v. Mobile County School Board*, Civil Action No. 3003-63 (S/D Ala.). During the course of this court's continuing jurisdiction in *Davis*, there have been 15 or more appeals to the Fifth Circuit. As hereinbefore set out, the Board has been repeatedly guilty of dilatory practices and it cannot justly claim credit for the improvement of the school system today since they are

operating under a court order and the watchful eye of the court in the implementation of that order.[26]

There has been a lack of responsiveness in employment and the operation of a dual school system. The disestablishment of that system and the establishment of a unitary system has been significantly slow. It is this court's opinion that leadership should be furnished in non-discriminatory hiring and promotion by our government, be it local, state, or federal.[27]

3. NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS.

The Alabama legislature has offered little evidence of a preference one way or the other for multi-member

[26] All members of the school board just prior to the November 1976 election resided in metropolitan Mobile. Four members of the school board presently reside in metropolitan Mobile. There have been orders from this court against the City of Mobile or its departments to desegregate the police department, the golf course, public transportation, the airport, and an order affecting the City and County which attack racial discrimination, to wit, the *Allen, Anderson, Sawyer, Evans,* and *Cooke, supra,* cases.

[27] *Norman R. McLaughlin, etc. v. Howard H. Callaway, et al.*, Civil Action No. 74-123-P, S/D Ala., 9/30/74, at p. 22:

> "It is only fitting that the government take the lead in the battle against discrimination by ferreting out and bringing an end to racial discrimination in its own ranks."

Mobile has no ordinances proclaiming equal employment opportunity, either public or private, to be its policy. There are no non-discriminatory rental ordinances. On the one hand, the federal courts are often subjected to arguments by recalcitrant state and local officials of the encroachment of the federal bureaucracy and assert Tenth Amendment violations—while making no mention that were it not for such "encroachment" citizens would not have made the progress they have to fulfillment of equal rights. Recent history bears witness to this proposition.

or at-large districts in its counties. This court finds state policy regarding multi-member at-large districting as neutral.

4. PAST RACIAL DISCRIMINATION.

It is this court's opinion that fair and effective participation under the present electoral system is, because of its structure, difficult for the black citizens of Mobile County. Past discriminatory customs and laws that were enacted for the sole and intentional purpose of extinguishing or minimizing black political power is responsible. The purposeful excesses of the past are still in evidence today. Indeed, Judge Rives, writing for a three-judge panel finding the Alabama poll tax to be unconstitutional, stated forcefully:

> "'The long history of the Negroes' struggle to obtain the right to vote in Alabama has been trumpeted before the Federal Courts of this State in great detail. *** If this Court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf.' We would be blind with indifference, not impartiality, and deaf with intentional disregard of the cries for equality of men before the law." *U.S. v. State of Alabama*, 252 F.Supp. at 104 (M.D. Ala. 1966), [citing *Sims v. Baggett*, 247 F.Supp. 96, 108-09 (M.D. Ala. 1965)].

Without question, past discrimination, some of which continues to today as evidenced by the orders in several lawsuits in this court against the city and county, and demonstrated in the lack of access to the selection process and the school commissioners' unresponsiveness, contributes to black voter dilution.

5. ENHANCING FACTORS.

Zimmer, in addition to enumerating four substantial criteria in proving voter dilution, listed four "enhancing factors" that should be considered as proof of aggravated dilution.

a. *Large Districts.* The present at-large election system is as large as possible, i.e., the county. The county, with an area of 1,240 square miles and 317,308 persons, according to the 1970 Census, can reasonably be divided into election districts. It is common knowledge that numerous counties in the State have countywide offices such as county commissioners, divided into single-member districts and function reasonably well. It is large enough to be considered large within the meaning of this factor.

b. *Majority Vote Requirements.* There is a majority vote requirement for primary elections, Title 17, Sec. 366, *Code of Alabama* (1958). There is no such requirement in the general election. Very rarely, if ever, have more than two persons opposed one another in a general election. As a practical matter, in the past, the effects of a majority vote have prevailed.

c. *Anti-single Shot Voting.* There is no anti-single shot voting provision in the present system of electing members of the Board. The Board members do run for a numbered place, Title 17, Sec. 153(1), *Code of Alabama* (1958). This place provision has to some extent the same result as the anti-single shot voting provision. At least in part, the practical results of an anti-single shot provision obtains in Mobile County.

d. *Lack of Residency Requirement.* The present system of election of the Board members does not

contain any provision requiring that any commissioner reside in any specific district or one geographical area of the county.

IV.

The court has made a finding for each of the *Zimmer* factors, and most of them have been found in favor of the plaintiffs. The court has analyzed each factor separately, but has not counted the number present or absent in a "score-keeping" fashion.

The court has made a thoughtful, exhaustive analysis of the evidence in the record " . . . paying close attention to the facts of the particular situation at hand," *Wallace*, 515 F.2d at 631, to determine whether the minority has suffered an unconstitutional dilution of the vote. This court's task is not to tally the presence or absence of the particular factors, but rather, its opinion represents " . . . a blend of history and an intensely local appraisal of the design and impact of the multi-member district [under scrutiny] in light of past and present reality, political and otherwise." *White*, 412 U.S. at 769-70.

The court reaches its conclusion by following the teachings of *White, Dallas v. Reese*, 421 U.S. 477, 480, 95 S.Ct. 1706, 44 L.Ed.2d 312 (1975), *Zimmer, Fortson*, and *Whitcomb*, et al.

The evidence when considered under these teachings convinces this court that the at-large districts "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb*, 403 U.S. at 143, and *Fortson*, 379 U.S. at

439, and "operates impermissibly to dilute the voting strength of an identifiable element of the voting population,". *Dallas*, at 480. The plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors cataloged in *Zimmer*.

In summary, this court finds that the electoral structure, the multi-member at-large election of Mobile County School commissioners, results in an unconstitutional dilution of black voting strength. It is "fundamentally unfair", *Wallace*, 515 F.2d at 630, and invidiously discriminatory.

The Supreme Court has laid down the general principle that "when district Courts are forced in fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor v. Johnson*, 402 U.S. 690, 692, 91 S.Ct. 1760, 29 L.Ed.2d 268 (1971). The Court reaffirmed this twice in the last term. *East Carroll Parish School Board*, and *Wallace, supra*. Once the racial discriminatory evil has been established, as it was in *White*, the dilution occasioned by the multi-member at-large election requires the disestablishment of the multi-member at-large election and the obvious remedy is to establish single-member districts.

This court does not endorse the idea of quota voting or elections, nor of a weighted vote in favor of one race to offset racial prejudice or any other adversity. However, when the electoral structure of the government is such, as in this case, that racial discrimination precludes a black voter from an effective participation in the election system, a dilution of his and other black votes has occurred.

The moving spirit present at the conception of this

nation, "all men are created equal," will not rest and the great purpose of the Constitution to "establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity. . . ." will be only a dream until every person has an opportunity to be equal. To have this opportunity, every person must be treated equally in the electoral process.

A county school commissioner election plan which includes small single-member districts will provide blacks a realistic opportunity to elect blacks to the Board of School Commissioners. No such realistic opportunity exists as the Board is presently structured. A single-member district plan would afford such an opportunity. Blacks' effective participation in the elective system will have the salutary effect of giving them a realistic opportunity to get into the mainstream in the operation of Mobile's school system which has a ratio range of 55/45 to 60/40, white/black students. It will give them an opportunity to have an input and impact on the educational system. Good quality education equally available to all, (with the people having a compassionate concern, love, for one another) probably affords the best hope for a strong democracy and the sharing of this nation's economic and social benefits. It will afford an opportunity for a more meaningful dialogue between the whites and blacks to develop.

V.

There is a traditional constitutional tolerance of various forms of local government. See, e.g.; *Abate v.*

Mundt, 403 U.S. 182, 185, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971).

The court recognizes the "delicate issues of federal-state relations underlying this case." *Mayor of the City of Philadelphia*, 415 U.S. at 615.

The single-member districts have advantages other than correcting constitutional differences as found in this decree.[28]

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[28] *William Dove, Sr., et al. v. Charles E. Moore, et al.*, S.O. 75-1918 (8th Cir. 7/27/76), set out in footnote 3:

"The author has previously discussed at length the undesirable characteristics of at-large elections and the benefits of single-member districts. *Chapman v. Meier*, 372 F. Supp. 371, 388-94 (D. N.D. 1974) (three-judge court) (Bright, J., dissenting), *majority reversed*, 420 U.S. 1 (1975). In the context of a discussion of proposed plans for the reapportionment of a state legislature, the dissent emphasized the following benefits of single-member districts:

(1) It gives a voter a chance to compare only two candidates, head to head in making a choice.
(2) It prevents one political party with a heavy plurality in one or two potential districts from dominating other potential districts that might narrowly go for the candidate of the opposite party.
(3) It prevents a city wide political organization from ostracizing or disciplining a legislator, who dares stray from the machine's line.
(4) It permits a citizen to identify a legislator as his senator and makes direct communication easier.
(5) It makes each senator responsible for his actions and makes it difficult for a senator to fade into the ranks of "the team" to avoid being identified with specific actions taken.
(6) It reduces campaign costs and "personalizes" a campaign.
(7) It creates greater interest in the possibility of a citizen seeking a legislative seat without the political machine blessing.
(8) It would diminish the animosity created in the legislature against multi-senate districts because of the tendency of

(continued)

The court hereby adopts the plan, including the map designating the districts, submitted by the plaintiffs and attached as "Appendix B" and is part of this decree the same as if set out at length herein. This plan divides the county into five single-member districts. The lines are drawn along traditional precinct lines which will minimize voting conflicts. There is a maximum population variation in the districts of *6.3%*

The court has stated repeatedly to the parties that it felt constrained to tinker with the present size of the membership and other features of the existing method of election as little as possible, i.e., require only that which is necessary to meet the constitutional mandates of this decree.

The Commissioners for Districts 3 and 4 will be elected in 1978. Commissioners for Districts 2 and 5 will be elected in November, 1980. The commissioner for District 1 will be elected in November, 1982. the commissioners will take office on the date as provided by the laws of the State of Alabama.

As the single-member districts are elected in the future, each school commissioner shall have been a resident of the district which that person represents for not less than 12 months immediately preceding that person's election and shall reside in the district during that person's term of office. All other qualifying elegibility requirements should be that as provided by

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(footnote continued from preceding page)

senators elected by one political party from a city to vote as a bloc.
(9) It would tend to guarantee an individual point of view if all senators are not elected as a team.
(10) It would equalize the power of people in single senate districts with the people in the broken down multi-senate districts to *influence* the election of only one senator.

[372 F. Supp. at 391 (footnote omitted) (emphasis in original).]

the laws of the State of Alabama. All other laws of the State of Alabama as apply to the Mobile County School System not in conflict with this order shall govern.

The Board since 1919 has been made up of five members. Various proposals have been made to enlarge the membership and designate when the new members should be elected. It is the court's considered judgment that changes made by the court should be minimal and only to correct constitutional deficiencies. For these reasons, the number of the members of the Board, the length of the term of office, and the staggered office terms and election, are to remain as provided by the legislature.

The plaintiffs desired a hearing far enough in advance of the November election for the court to make a decision, and if single-member districts were provided, that a special election be held prior to the 1976 general election with the winners of the various party elections being placed on the November general election ballot. If this was not done, they requested a special election be called after the general election.

The defendants desired that all elected members of the Board be allowed to serve out their respective terms until vacancies were created in sufficient number to fill the single-member districts predominantly populated by black voters.

Due to the time problems created by the dismissal, and later adding the school commissioners as defendants, the defendants would not have had sufficient time to prepare their defense, and the court would have been unable to make a reasoned judgment for elections to be held in 1976.

The court is unwilling to put the taxpayers to the expense of special elections, and the court is unwilling to deny the blacks the relief they are entitled to until 1980, a period of four years. The court is desirous of mitigating the adjustment and seeing that each elected member on the Board serves the longest possible period of time.

During the course of the trial, the court was advised by these defendants that they were interested in implementing a single-member district plan, shortening the litigation and reducing the expenses. They requested an opportunity for the defendants and plaintiffs to negotiate a compromise settlement. The parties indicated they desired some guidelines from the court concerning when the election of single-member representatives would take place, and, if any of the elected members' terms would be shortened, which one. The court stated in substance the above election schedule and stated it appeared equitable to the court that if any member's terms were shortened, it should be those who had the least remaining time of service remaining on their six year term.

This approach continues to be the view of the court as an equitable solution. The present board members who will have the least remaining time of service, or who will have served most of their elected term at the time of the 1978 elections, will be Board members Alexander and Drago.

Under the ordered single-member district plan which requires residence in the district which the commissioner represents, the present Board members now reside in the districts as follows:

Commissioners Bosarge, Alexander, and Berger in

District 2.

Commissioner Sessions in District 4.

Commissioner Drago in District 5.

No one resides in District 3 which has a majority black population and is entitled to a commissioner in 1978. Commissioner Sessions resides in District 4 which has a majority black population and is entitled to a place in 1978. Commissioner Sessions' term expires in 1978 and there will automatically be a vacancy for that district at that time.

In order for District 3 to have a place, one other Board member's term must be shortened or modified. Proceeding on the premises above stated of shortening or modifying members' terms who had the least remaining time of service, the choice narrows to Commissioners Alexander and Drago.

It appears more equitable to the court to modify one commissioner's powers and duties and allow that commissioner to complete his term rather than shorten it. For the remaining four commissioners, presently in office, after 1978, to complete their currently elected terms with new commissioners to be elected for Districts 3 and 4 in 1978, would make a Board consisting of six members. A six member board would lend itself to possible tie votes of three to three. The Board could be rendered ineffective under such conditions.

Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election in 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election in 1978, but will be

occupied by either Commissioner Alexander or Drago.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve until the general election in 1980, and the successors for the two places elected in 1980 have qualified and taken office. The Chairman to be elected is to be either Commissioner Alexander or Commissioner Drago, the two members of the present Board with the least remaining years of service in their elected term. Their present terms expire after the general election in November, 1980, when their successors have been elected, qualified and taken office according to the laws of Alabama. The Chairman will have all the powers the Chairman would have under the law, rules, and regulations they are governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstension, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners for Districts 3 and 4; there shall be elected in November, 1980, school commissioners for Districts 2 and 5; and there shall be elected in November, 1982, a school commissioner from District 1.[29]

[29]All the Districts to be as described in Appendix B.

It is further ORDERED, ADJUDGED and DECREED that whenever there shall be a change in any of the five districts heretofore established, evidenced by a federal census of population published following a federal census hereafter taken, there shall be a reapportionment of the school commissioner districts in the manner hereinafter provided.

(1) The school commissioners shall within six months after the publication of each decennial federal census of population for the county, commencing with the 1990 census, file with this court a report containing a recommended plan for the reapportionment of the school commissioner boundaries to comply with the following specifications:

(a) Each district shall be formed of contiguous and to the extent reasonably possible, compact territory, and its boundary lines shall follow State Senate and House district lines, ward or precinct lines, to the mazimum extent possible and other boundary lines shall be the center lines of streets or other well defined boundaries.

(b) Each district shall contain as nearly as is reasonable, the same population.

(2) The report shall include a map and description of the districts.

(3) The provisions of the 1965 Voting Rights Act shall be complied with.

(4) The school commissioners shall comply with any other United States Congressional legislation relating to this subject matter and in compliance with the United States constitutional law.

(5) Upon compliance with the above provisions, the redistricting should become effective.

(6) Such redistricting shall not apply to any regular or special election held within six months after its becoming effective. No incumbent member of the Board shall be deprived of his unexpired term of office because of such redistricting.

It is further ORDERED, ADJUDGED and DECREED that the defendants, John L. Moore, individually and in his official capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County, Robert R. Williams, Dan. C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually and in their official capacities as School Commissioners of Mobile County, Alabama; the Board of School Commissioners of Mobile County, Alabama, and Mobile County, Alabama, their agents, servants, employees, and successors, are hereby ENJOINED from failing to:

(1) Redistrict as set out above.
(2) Make and hold the elections as redistricted.

The defendant Board of School Commissioners and Mobile County are taxed with the costs, including attorneys' fees.

Within 30 days from this date, the attorneys for the plaintiffs are to file affidavits setting forth their claim for attorney's fees, including hours worked and hourly charges. The defendants, School Board Commisioners and Mobile County, are to be sent a copy of this claim and these defendants may object in writing within 15 days.

This court retains jurisdiction for the implementation of this order.

Done, this the 9th day of December, 1976.

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
9th DAY OF DECEMBER, 1976
MINUTE ENTRY NO. 42,403
WILLIAM J. O'CONNOR, CLERK
BY _____
Deputy Clerk

"APPENDIX A"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,	)	
Plaintiffs,	)	
V.	)	CIVIL ACTION No. 75-298-P
JOHN L. MOORE, et al.,	)	
Defendants.	)	

ORDER ON DEFENDANT BOARD OF SCHOOL COMMISSIONERS' MOTION TO SEVER AND DISMISS OR CONTINUE

The defendant's motion to sever is hereby DENIED.

The defendant's motion to dismiss is hereby DENIED.

The defendant's motion to continue in order to give the Legislature of the State of Alabama an opportunity to act on a proposed redistricting is hereby DENIED.

The complaint was filed June 9, 1975. The defendant's attention is directed to a conference with the attorneys for the Board of School Commissioners, the County Commissioners, and the City Commission of the City of Mobile, in open court on July 14, 1976. The long delay of the defendant in answering the complaint making the School Board, et al., defendants a second time, was called to the attention of the attorney for the defendant School Board.

It was at the request of the defendant School Board that a continuance was granted of the trial of their case at that time, although there were mitigating court scheduling problems.

It was common knowledge at that time that a proposed redistricting plan had been passed at a previous session of the Legislature but later declared unconstitutional. It was common knowledge there was pending in the State Legislature which was then in session a redistricting plan. The court specifically advised counsel for all the parties that the court would not be disposed to further delay the trial or decision after the September, 1976, setting, and if any, or all of the defendants, anticipated seeking changes in the makeup or districting of their respective Commissions or Boards, they should take action while the Legislature was then in session. Due to the age of this case, and the Legislature having had two opportunities to act during its pendency, additional delays are not justified.

Done, this the 7th day of September, 1976.

/s/ Eligible
UNITED STATES DISTRICT
JUDGE

U. S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
7th DAY OF SEPTEMBER, 1976
MINUTE ENTRY NO.
WILLIAM J. O'CONNOR, CLERK
BY /s/ G. R. Sylvester
Deputy Clerk

APPENDIX B

Analysis of Plaintiffs' Plan for School Board

District

District	Ward/ Precinct	Population	% Black VAP	Weighted Black Pop.
1	100-4	7,760	.006	46
	101-1	7,310	.007	51
	North	37,665		7,514
	West	12,851		1,538
		65,585		9,149
				13.9%
2	104-5	4,767	.02	95
	South	34,924		5,148
	100-1	3,122	.05	156
	100-2	2,078	.08	166
	100-3	7,007	.22	1,542
	101-3	5,520	.004	22
	101-2	4,196	.026	109
		61,614		7,238
				11.7%
3	Prichard	41,578		21,005
	98-1	9,438	.666	6,286
	99-1	12,709	.91	11,565
		63,725		38,856
				61.0%

4	99-2	8,664	.954	8,265
	99-3	4,510	.906	4,086
	99-4	5,536	.997	5,519
	103-1	8,946	.995	8,901
	103-2	4,672	.465	2,172
	103-3	8,903	.636	5,662
	102-2	4,896	.03	147
	102-3	4,244	.01	42
	103-4	11,419	.026	297
		61,790		35,091
				56.8%
5	102-4	2,704	.003	8
	102-6	5,280	.043	227
	102-7	3,872	.785	3,040
	102-1	4,793	.22	1,054
	102-5	6,914	.000	0
	101-4	5,833	.074	432
	104-1	8,091	.117	947
	104-2	3,514	.07	246
	104-3	8,410	.067	563
	104-4	6,029	.008	48
	101-5	5,664	.074	419
	101-6	3,489	.074	258
		64,593		7,242
				11.2%

Sources: figures compiled by Tony Parker for regression analysis.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,	)	
	)	
Plaintiffs,	)	
	)	CIVIL
	)	ACTION
V.	)	No. 75-298-P
	)	
JOHN L. MOORE, etc., et al.,	)	
	)	
Defendants.	)	

ORDER AND DECREE AMENDING ORDER AND DECREE DATED DECEMBER 9, 1976

The opinion and order signed by this court December 9, 1976, is AMENDED as follows:

The style of the case is AMENDED to read as follows:

"LEILA G. BROWN, MARY LOUISE	)	
GRIFFIN, COOLEY, JOANNIE ALLEN	)	
DUMAS, ELMER JOE DAILY	)	
EDWARDS, ROSIE LEE HARRIS,	)	
HAZEL C. HILL, JEFF KIMBLE,	)	
FRANCES J. KNIGHT, JOHN W.	)	
LEGGETT, JANICE M. McAUTHOR,	)	
	)	
Plaintiffs,	)	
	)	
V.	)	CIVIL
	)	ACTION
JOHN L. MOORE, individually and in	)	No. 75-298-P
his official capacity as Probate Judge of	)	

Mobile County; JOHN E. MANDEVILLE,) individually and in his official capacity as) Court Clerk of Mobile County, THOMAS J.) PURVIS, individually and in his official) capacity as Sheriff of Mobile County;) HOWARD E. YEAGER, COY SMITH, G.) BAY HAAS, individually and in their official) capacity as Mobile County Commissioners;) MOBILE COUNTY; THE BOARD OF) SCHOOL COMMISSIONERS, ROBERT) R. WILLIAMS, DAN C. ALEXANDER,) JR., NORMAN J. BERGER, RUTH F.) DRAGO, HOMER L. SESSIONS, indivi-) dually and in their official capacity as School) Commissioners of Mobile County, Alabama,))
Defendants.")

On page 3, the first paragraph is AMENDED to read as follows:

"This court has jurisdiction over the claims grounded on 42 U.S.C. Sec. 1983 against the Board members and over the claims grounded on 42 U.S.C. Sec. 1973 against all defendants and under 28 U.S.C. Secs. 1343(3)-(4) and 2201."

On page 3, that portion of the fourth paragraph ". . . the Sheriff, and Mobile County." is AMENDED to read "the Sheriff and the Board of School Commissioners of Mobile County."

On page 44, the second and third sentence in the first paragraph is AMENDED to read as follows:

"The Commissioner for District 5 will be elected in November, 1980. The Commissioners for Districts 1 and 2 will be elected in November, 1982."

On page 44, in the third paragraph, the portion of the second sentence, which reads as follows:

". . . and the staggered office terms and election, are to remain. . . ."

is AMENDED to read as follows:

". . . and the staggered office terms and election, except as modified herein, are to remain. . . ."

Page 47 is AMENDED to read as follows:

"Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election in 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election prior to November, 1980, but will be occupied by either Commissioner Alexander or Drago until the expiration of the period of the present term they are now serving.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve to the end of the term in 1980 for which that person has been elected. The Chairman to be elected is to be either Commissioner Alexander or Commissioner Drago, the two members of the present Board with the least remaining years of service in their elected term. Their present terms expire after the general election in November, 1980.

Since Commissioner Drago's term expires at that time and her place would ordinarily be up for election in the general election of November, 1980, her

successor will be elected from District 5 in the general election of 1980. Commissioner Drago will serve to the end of the term for which she has been elected and until her successor has been elected, qualified, and taken office according to the laws of Alabama. Since Commissioner Alexander resides in District 2, and Commissioners Bosarge and Berger live in District 2, no vacancy will exist in that district in 1980. Commissioner Alexander will serve until the end of the term in 1980 to which he was elected in 1974.

The Chairman elected under this order will have all the powers the Chairman would have under the law, rules, and regulations the Chairman is now governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstension, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners from District 3 and 4; there shall be elected in November, 1980,"

On page 48, the first three lines are to be AMENDED to read as follows:

"a school commissioner for District 5; and there shall be elected in November, 1982, school commissioners from District 1 and 2.[29]"

Done, this the 13th day of December, 1976.

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
13TH DAY OF DECEMBER 1976
MINUTE ENTRY NO. 42,431
WILLIAM J. O'CONNOR, CLERK
BY

Deputy Clerk

APPENDIX "C"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
213 U. S. COURT HOUSE & CUSTOM HOUSE
MOBILE, ALABAMA 36602

DATE: JANUARY 4, 1977

TO: Mr. Robert C. Campbell, III, Daniel A. Pike and Frank G. Taylor, 800 Downtowner Blvd., Mobile, Alabama 36609
Messrs. J. U. Blacksher & Larry Menefee, 1407 Davis Ave., Mobile, Alabama 36603
Mr. Edward Still, Suite 601, Title Bldg., 2030 - 3rd Avenue, North, Birmingham, Alabama 35203

RE: CIVIL ACTION NO. 75-298-P

LEILA BROWN, ET AL VS. JOHN L. MOORE, ETC., ET AL

****
****

You are advised that on the 4TH day of JANUARY 1977 the following action was taken in the above-entitled case by Judge Virgil Pittman:

Motion for Re-Hearing filed by ROBERT R. WILLIAMS, ET AL (School Board Commissioners) on 12-21-76 is DENIED.

WILLIAM J. O'CONNOR, CLERK
BY: /s/ William J. O'Connor
Deputy Clerk

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, MARY LOUISE GRIFFIN, COOLEY, JOANNIE ALLEN DUMAS, ELMER JOE DAILY EDWARDS, ROSIE LEE HARRIS, HAZEL C. HILL, JEFF KIMBLE, FRANCES J. KNIGHT, JOHN W. LEGGETT, JANICE M. McAUTHOR,	)	
Plaintiffs,	)	
V.	)	
JOHN L. MOORE, individually and in his official capacity as Probate Judge of Mobile County; JOHN E. MANDEVILLE, individually and in his official capacity as Court Clerk of Mobile County, THOMAS J. PURVIS, individually and in his official capacity as Sheriff of Mobile County; HOWARD E. YEAGER, COY SMITH, G. BAY HAAS, individually and in their official capacity as Mobile County Commissioners; ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, individually and in their official capacity as School Commissioners of Mobile County, Alabama,	)	CIVIL ACTION No. 75-298-P
Defendants.	)	

JUDGMENT

This court has heretofore entered its findings of fact and conclusions of law in favor of the plaintiffs and against the defendants, John L. Moore, individually and in his official capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his official capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County; Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually and in their official capacity as School Commissioners of Mobile County, Alabama, and Mobile County, Alabama.

The court has found that the electoral structure, the multi-member at-large election of the School Commissioners of Mobile County, results in an unconstitutional dilution of the black plaintiffs' voting strength. It is fundamentally unfair and invidiously discriminatory.

In the plan adopted and approved by the court and attached to the court's Opinion and Order as "Appendix B" thereof, the Commissioners for Districts 3 and 4 will be elected in 1978. A commissioner for District 5 will be elected in November, 1980. The commissioners for Districts 1 and 2 will be elected in November, 1982. The commissioners will take office on the date as provided by the laws of the State of Alabama.

As the single-member districts are elected in the future, each school commissioner shall have been a resident of the district which that person represents for

not less than 12 months immediately preceding that person's election and shall reside in the district during that person's term of office. All other qualifying and eligibility requirements should be that as provided by the laws of the State of Alabama. All other laws of the State of Alabama as apply to the Mobile County School System not in conflict with this order shall govern.

The number of the members of the Board, the length of the term of office, and the staggered office terms and election, are to remain as provided by the legislature.

Under the ordered single-member district plan which requires residence in the district which the commissioner represents, the present Board members now reside in the districts as follows:

Commissioners Bosarge, Alexander, and Berger in District 2.

Commissioner Sessions in District 4.

Commissioner Drago in District 5.

No one resides in District 3 which has a majority black population and is entitled to a commissioner in 1978. Commissioner Sessions resides in District 4 which has a majority black population and is entitled to a place in 1978. Commissioner Sessions' term expires in 1978 and there will automatically be a vacancy for that district at that time.

In order for District 3 to have a place, one other Board member's term must be shortened or modified. Proceeding on the premises stated of shortening or modifying members' terms who had the least remaining time of service, the choice narrows to Commissioners Alexander and Drago.

Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election in 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election prior to November, 1980, but will be occupied by either Commissioner Alexander or Drago until the expiration of the period of the present term they are now serving.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve to the end of the term in 1980 for which that person has been elected. The Chairman to be elected is to be either Commissioner Alexander or Commissioner Drago, the two members of the present Board with the least remaining years of service in their elected term. Their present terms expire after the general election in November, 1980.

Since Commissioner Drago's term expires at that time and her place would ordinarily be up for election in the general election of November, 1980, her successor will be elected from District 5 in the general election of 1980. Commissioner Drago will serve to the end of the term for which she has been elected and until her successor has been elected, qualified, and taken office according to the laws of Alabama. Since Commissioner Alexander resides in District 2, and Commissioners Bosarge and Berger live in District 2, no vacancy will exist in that district in 1980.

Commissioner Alexander will serve until the end of the term in 1980 to which he was elected in 1974.

The Chairman elected under this order will have all the powers the Chairman would have under the law, rules, and regulations the Chairman is now governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstention, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners from District 3 and 4; there shall be elected in November, 1980, a school commissioner for District 5; and there shall be elected in November, 1982, a school commissioner from District 1 and a school commissioner from District 2.[1]

It is further ORDERED, ADJUDGED and DECREED that whenever there shall be a change in any of the five districts heretofore established, evidenced by a federal census of population published following a federal census hereafter taken, there shall be a reapportionment of the school commissioner districts in the manner hereinafter provided.

(1) The school commissioners shall within six months after the publication of each decennial federal census of population for the county, commencing with the 1990 census, file with this court a report containing a recommended plan for the reapportionment of the school commissioner boundaries to comply with the following specifications:

---

[1]All the Districts to be as described in Appendix B to the Opinion and Order.

(a) Each district shall be formed of contiguous and to the extent reasonably possible, compact territory, and its boundary lines shall follow State Senate and House district lines, ward or precinct lines, to the maximum extent possible and other boundary lines shall be the center lines of streets or other well defined boundaries.

(b) Each district shall contain as nearly as is reasonable, the same population.

(2) The report shall include a map and description of the districts.

(3) The provisions of the 1965 Voting Rights Act shall be complied with.

(4) The school commissioners shall comply with any other United States Congressional legislation relating to this subject matter and in compliance with the United States constitutional law.

(5) Upon compliance with the above provisions, the redistricting should become effective.

(6) Such redistricting shall not apply to any regular or special election held within six months after its becoming effective. No incumbent member of the Board shall be deprived of his unexpired term of office because of such redistricting.

It is further ORDERED, ADJUDGED and DECREED that the defendants, John L. Moore, individually and in his official capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman Jr. Berger, Ruth F. Drago, Homer L. Sessions,

individually and in their official capacities as School Commissioners of Mobile County, Alabama; the Board of School Commissioners of Mobile County, Alabama, and Mobile County, Alabama, their agents, servants, employees, and successors, are hereby ENJOINED from failing to:

(1) Redistrict as set out above.

(2) Make and hold the elections as redistricted.

The defendant Board of School Commissioners is taxed with the costs, including attorneys' fees.

Within 30 days from this date, the attorneys for the plaintiffs are to file affidavits setting forth their claim for attorneys' fees, including hours worked and hourly charges. The defendant School Board Commissioners are to be sent a copy of this claim and these defendants may object in writing within 15 days.

This court retains jurisdiction for the implementation of this order.

Done, this the 18th day of January, 1977.

_____

UNITED STATES DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
18th DAY OF JANUARY 1977
MINUTE ENTRY NO. ____
WILLIAM J. O'CONNOR, CLERK
BY _____
Deputy Clerk

APPENDIX "E"

Local Acts of Alabama, 1919, p. 73

AN ACT

To further regulate the public school system of the county of Mobile by establishing a Board of School Commissioners for Mobile County, of five members, in the place and stead of the Board of School Commissioners of Mobile County as at present constituted; which new board of five members shall have the same title and exercise the same rights, powers, duties and privileges as are now had and exercised by the Board of School Commissioners of Mobile County as at present constituted; and, to that end, to abolish the Board of School Commissioners of Mobile County as now constituted.

Section 1. *Be it enacted by the Legislature of Alabama,* That the Board of School Commissioners of Mobile County as now constituted and existing is hereby abolished.

Section 2. Be it further enacted that the Superintendent of Education of the State of Alabama, is hereby required to appoint as the members of the Board of School Commissioners of Mobile County which shall exist under this Act, five persons out of and from the Board of nine members as at present constituted. This said, Superintendent of Education of the State of Alabama shall so appoint the members of the Board of School Commissioners to hold office under this Act, as soon as is reasonably practicable after this Act shall have become law. Until the Superintendent of Education of the State of Alabama shall have so appointed the new Board herein provided for,

the old Board of School Commissioners of Mobile County, being the Board as at present constituted, shall continue to hold office and administer the public school system in Mobile County.

Section 3. Be it further enacted that the Superintendent of Education of the State of Alabama shall make known his appointment of the five members who shall constitute the Board of School Commissioners of Mobile County under this Act, by a notice in writing to each of the five members and also by a formal proclamation addressed to the Board of School Commissioners of Mobile County. At once upon the giving, by the said Superintendent of Education of such notices, and the promulgation of such formal proclamation, the Board of School Commissioners of Mobile County, as at present constituted, shall forthwith cease to exist and the new Board of School Commissioners of Mobile County, under this Act, shall forthwith come into being.

Section 4. Be it further enacted that in appointing the five members of the Board of School Commissioners of Mobile County under this Act, here-in-before provided for, the Superintendent of Education of the State of Alabama, shall divide the said five members into three classes which shall be styled Class1, Class 2, and Class 3, Class 1 shall consist of two members, Class 2 shall consist of two members and Class 3 shall consist of one member. The members in Class 1 shall hold office until the general election in 1920, and until their successors shall have been elected and qualified. The term of office of their successors shall be six years. The members in Class 2 shall hold office until the general election in 1922 and until their successors are elected and

qualified. The term of office of their successors shall be six years. The member in Class 3 shall hold office until the general election in 1924 and until his successor shall be elected and qualified. The term of office of his successor shall be six years. So in every second year thereafter, at the general election in that year, there shall be elected by the people successors to the members of the Class whose term of office is then expiring. The term of office of the Commissioners elected by the people at the general elections under this Act, shall be six years.

Section 5. At the general election in 1920 the successors to the two members of Class one, and at the general election in 1922 the successors to the two members of Class two, and at the general election in 1921, the successors to the one member of Class three, shall be elected by the voters of the county at large.

Section 6. Be it further enacted that the Board of School Commissioners of Mobile County as established under and by this Act shall have the same title as the present Board to-wit, Board of School Commissioners of Mobile County, and shall have and exercise all the rights, powers, duties and privileges that are now held and exercised by the Board of School Commissioners of Mobile County as now constituted, the whole purpose of this Act being the creating, of a Board containing five members in lieu of a Board containing nine members, and otherwise not to disturb or in any way affect the body of existing law regulating and governing the system and conduct of public schools in Mobile County, except as expressly set out in this Act as necessary to make harmonious the present Act with the said body of the existing law.

Section 7. Be it further enacted, that three members shall constitute a quorum at any meeting of the Board of School Commissioners established by and under this Act, whether such meeting be a special, general or regular meeting, and any and all acts taken by a quorum in the name of the Board, shall be valid and binding as fully as if taken at a meeting having present the entire membership; provided, however, that no business involving a change in the system, rules or regulations or affecting the general interest of the county shall be transacted except at the regular meeting after due notice given, or when a full Board is in attendance; and provided further that the provisions of already existing law, requiring unanimous action of the board, or action by the full Board, in certain stated contingencies, are not by this Act changed or altered but remain in full force and effect.

Section 8. Be it further enacted that all laws and parts of laws in confict herewith are hereby expressly repealed.

Approved August 22, 1919.

APPENDIX "F"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 77-1583

LEILA G. BROWN, ET AL.,
Plaintiffs-Appellees,

-versus-

JOHN L. MOORE, ET AL.,
Defendants

ROBERT R. WILLIAMS, ET AL.,
Defendants-Appellants,

Appeal from the United States District Court
for the Southern District of Alabama

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Appellants, Board of School Commissioners for the public schools of Mobile County, et al, hereby appeal to the Supreme Court of the United States from the final order entered in this action on June 2, 1978, affirming the judgment of the District Court and upholding its injunction.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

SINTZ, PIKE, CAMPBELL & DUKE
Attorneys for Appellants

BY: /s/ Robert C. Campbell, III
ROBERT C. CAMPBELL, III

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal to the United States Supreme Court has been served by placing the same in the United States mail with proper postage prepaid, addressed to all opposing counsel of record as listed below:

Honorable Wade H. McCree, Jr.
Solicitor General of the United States
Department of Justice
Washington, D.C. 20530

Edward Still, Esquire
601 Title Building
Birmingham, Alabama 35203

Jack Greenberg, Esquire
Eric Schnapper, Esquire
10 Columbus Circle
New York, New York 10019

Armand Derfner, Esquire
Post Office Box 608
Charleston, South Carolina 29402

J. U. Blacksher, Esquire
Larry T. Menefee, Esquire
1407 Davis Avenue
Mobile, Alabama 36603

/s/ Robert C. Campbell, III
COUNSEL FOR
APPELLANTS

Supreme Court, U. S.
FILED
JAN 8 1979
MICHAEL RODAK, JR., CLERK

APPENDIX

Volume I—pages 1a-322a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-357

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT FILED AUGUST 30, 1978
PROBABLE JURISDICTION NOTED OCTOBER 30, 1978

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IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 77-1583
Summary Calendar*

LEILA G. BROWN, et al.,
Plaintiffs-Appellees,
Cross-Appellants,

v.

JOHN L. MOORE, et al.,
Defendants,

ROBERT R. WILLIAMS, et al.,
Defendants-Appellants,
Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

(June 2, 1978)

Before GOLDBERG, AINSWORTH, and HILL, Circuit Judges.

PER CURIAM:

The Board of School Commissioners for the Public Schools of Mobile, Alabama appeals from the district court's determination that the election of school commissioners on an at-large

* Rule 18, 5 Cir. Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

basis unconstitutionally dilutes the votes of black citizens of Mobile. Appellants maintain that the court's order creating five single-member districts should be reversed. Plaintiffs cross appeal from the district court's decision to stagger the election of board members rather than order new elections for all five districts in 1978.

We have reviewed the district court's findings and conclusions. Judge Pittman has applied the proper standards for evaluating plaintiffs' contention that the election of school commissioners on an at-large basis dilutes the votes of black citizens and has carefully and thoroughly analyzed the record in light of these standards. On the basis of our own careful study of the record, we are convinced that the district court's findings are not clearly erroneous and that these findings amply support the conclusion that Mobile's at-large election system unconstitutionally depreciates the value of the black vote. *See* Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978). We further conclude that the order framed by the court below was well within the permissible scope of its equitable discretion. Accordingly, the judgment below is in all respects affirmed. The mandate shall issue forthwith.

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 77-1583
Summary Calendar

D.C. Docket No. CA-75-298-P

LEILA G. BROWN, et al.,
Plaintiffs—Appellees,
Cross—Appellants,

versus

JOHN L. MOORE, et al.,
Defendants,

ROBERT R. WILLIAMS, et al.,
Defendants—Appellants,
Cross—Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

June 2, 1978

ISSUED AS MANDATE: JUNE 2, 1978

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, MARY LOUISE GRIFFIN, COOLEY, JOANNIE ALLEN DUMAS, ELMER JOE DAILY EDWARDS, ROSIE LEE HARRIS, HAZEL C. HILL, JEFF KIMBLE, FRANCES J. KNIGHT, JOHN W. LEGGETT, JANICE M. McAUTHOR,

Plaintiffs,

v.

JOHN L. MOORE, individually and in his official capacity as Probate Judge of Mobile County; JOHN E. MANDEVILLE, individually and in his official capacity as Court Clerk of Mobile County, THOMAS J. PURVIS, individually and in his official capacity as Sheriff of Mobile County, HOWARD E. YEAGER, COY SMITH, G. RAY HAAS, individually and in their official capacity as Mobile County Commissioners; ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, INDIVIDUALLY and in their official capacity as School Commissioners of Mobile County, Alabama,

Defendants.

CIVIL ACTION
No. 75-298-P

OPINION AND ORDER AS TO THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ET AL.

This is an action brought by Leila G. Brown, and other black plaintiffs representing all Mobile County, Alabama, blacks as a class, claiming the present at-large system of electing county commissioners and school commissioners

abridges the rights of the County's black citizens under the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States; under the Civil Rights Act of 1871, 42 U.S.C. Sec. 1983; and under the Voting Rights Act of 1965, as amended, 42 U.S.C. Sec. 1973, *et seq.*

The defendants are the Board of School Commissioners of Mobile County (Board or school commissioners), Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, the Mobile County Commissioners, Howard E. Yeager, Coy Smith, G. Bay Haas, and the Probate Judge, John L. Moore, the Court Clerk of Mobile County, John E. Mandeville, and the Sheriff of Mobile County, Thomas J. Purvis, and Mobile County, who are sued individually and in their official capacities.

For purposes of clarity, a separate opinion and order will be rendered in this case against the school commissioners, et al., and the Mobile County Commissioners, et al.[1]

The plaintiffs contend that the at-large election system, in the historical and present context of official and social racism in Alabama and Mobile County, has for all practical purposes denied black citizens equal access to participation in the

[1] Many of the facts and most of the law in the Board of School Commissioners and the County Commissioners are as applicable to one defendant as to the other. There are some facts and points of law which are different, particularly with reference to the law creating the different offices and the unresponsiveness of each. Because of this, separate opinions and orders will be rendered. A similar lawsuit against the Mobile City Commissioners, Civil Action No. 75-297-P, *Wiley L. Bolden, et al.* v. *City of Mobile, et al.*, was tried within weeks of this case. All three cases have been under consideration simultaneously. Many of the facts, and much of the law, in the *City* case and *County* cases are the same. Where the applicable Findings of Fact and Conclusions of Law in the two cases and with reference to the respective defendants, are substantially the same, it will be set out at length rather than referring to one or other of the three opinions and orders.

countywide election of School Commissioners of Mobile County and has substantially diluted their vote.[2]

This court has jurisdiction over the claims grounded on 42 U.S.C. Sec. 1983 against the Board and over the claims grounded on 42 U.S.C. Sec. 1973 and under 28 U.S.C. Secs. 1343(3)-(4) and 2201.

This cause was certified as a class action under Rule 23(b)(2) F.R.C.P., the plaintiff class being all black persons who are now citizens of Mobile County, Alabama.

A claim originally asserted under 42 U.S.C. Sec. 1985(3) was dismissed for failure to state a claim upon which relief can be granted.

The defendants under consideration in this portion of the case are the five school commissioners, the Probate Judge, the Court Clerk of the County, the Sheriff, and Mobile County.

The plaintiffs seek a preliminary and permanent injunction enjoining all defendants and others acting at their direction or in concert with them, of holding, supervising, or certifying the results of any election for the Board under the present at-large election system and ordering the reapportionment of the Board into racially non-discriminatory single-member districts, together with attorneys' fees and costs. (See preliminary pretrial response filed July 30, 1976.)

Plaintiffs claim that to prevail they must prove to this court's satisfaction the existence of the elements probative of voter dilution as set forth by *White* v. *Regester*, 412 U.S. 755, 93 S. Ct. 2332, 37 L.Ed.2d 314 (1973), and *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom East Carroll Parish School Board* v. *Marshall*, *U.S.* , 96 S. Ct. 1083, 47 L.Ed.2d 296 (1976), contending *Zimmer* is only the adoption of specified criteria by the Fifth Circuit of the *White* dilution requirements.

[2] The plaintiffs also contended in its complaint that the present system of electing the school commissioners "discriminates against the rural interests in the county by submerging their local strength in the countywide urban majority." Plaintiffs did not pursue this aspect of the complaint either in the offering of evidence or final arguments. The court treats this ground as abandoned.

The Board defendants stoutly contest the claim of unconstitutionality of the Board as measured by *White* and *Zimmer.* They claim the plaintiffs have no constitutional right to a politically safe black district and that the mere showing of adverse impact on the plaintiffs' political fortunes will not warrant the relief requested as measured by *White* and *Zimmer.*

They further contend that *Washington* v. *Davis,* U.S. , 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976), erects a barrier since the legislative act forming the multi-member, at-large election of the Board members was without racial intent or purpose. They assert *Washington,* 96 S. Ct. at 2047-49, which was an action alleging due process and equal protection violations, held that in these constitutional actions, in order to obtain relief, proof of *intent* or *purpose* to discriminate by the defendants must be shown. Defendants state, therefore, that since the statute under which the Board members are elected was passed when essentially all blacks were disenfranchised, there could be no intent or purpose to discriminate at the time the statute or the Constitution was adopted. Alternatively, however, defendants contend that if *Washington* does not preclude consideration of the dilution factors of *White* and *Zimmer,* they should still prevail because plaintiffs have not sustained their burden of proof under these and subsequent cases.

Plaintiffs' reply is to the effect that *Washington* did not establish any new constitutional purpose principle and that *White* and *Zimmer* still are applicable. If, however, this court finds *Washington* to require a showing of racial motivation at the time of passage of the 1919 or later statutes, plaintiffs contend they should still prevail, claiming the at-large election system was designed and is utilized with the motive or purpose of diluting the black vote. Plaintiffs claim that the discriminatory intent can be shown under the traditional tort standard.

The defendants further contend that the plaintiffs are not entitled to relief because they do not come before the court with clean hands because the plaintiffs thwarted the efforts of the

Board to procure passage by the State Legislature of a constitutionally sound statute providing for single-member districts.

FINDINGS OF FACT

Mobile County, Alabama, is located in the southwestern part of the State bordered on the south by the Gulf of Mexico, on the west by the State of Mississippi, and a large portion of the county to the east by Mobile Bay. In 1970, the county's population was 317,308 with approximately 32.5% of the residents non-white. (Defendants' Exhibit No. 6, p. 1.)

A 1976 estimate placed the county's population at 337,200 with approximately 32.5% of the population non-white. (Defendants' Exhibit No. 6, p. 1.) Practically all county non-whites are black. The 1970 population of the City of Mobile was 190,026 with approximately 35.4% of the residents black.[3]

The 1970 voter age population, 18 years of age and older, was 64.8% for whites and 55.2% for blacks. (Defendants' Exhibit No. 6, p. 18.) An estimate of the black vote as percentage of the total vote in the 1976 primary elections was 24.4% black of the total vote cast. (Defendants' Exhibit No. 6, p. 24).

Almost two-thirds of the county's population resides in the City of Mobile and a large portion of the other blacks in the county reside in the adjoining municipality of Prichard. Of the 103,238 non-whites in the county, 88,890 live in Mobile and Prichard. Only 12,718 non-whites live outside the incorporated municipalities. (Defendants' Exhibit 6, p. 5). It is obvious that the evidence relating to the City of Mobile elections, and other

[3] The court takes judicial knowledge of its records. A companion case, *Bolden, et al.* v. *City of Mobile,* Civil Action No. 75-297-P, under consideration by the court at the same time this case was under consideration, Defendants' Exhibit No. 12, cited these figures according to the 1970 Federal Census.

evidence relating to voter dilution in the City of Mobile, are relevant in this case.

The Mobile County School System is unique in the State of Alabama. The first public school system in the State of Alabama was organized as the Mobile County System.[4]

The Constitution of 1901 preserved the integrity of this system.[5]

Most of the school systems in the rest of the State have both city and county school systems in the various counties.

The plaintiffs contend that the five member at-large scheme was the result of Act No. 498 passed on September 21, 1939, construed together with Title 52, Sec. 62, *et seq., Code of Alabama* (1958) (1939, etc. Acts), which is derived from the 1927 school code. The defendants contend that these are legislative acts of *general* application and have no applicability to the Mobile County Public School System by virtue of the provisions of Sec. 270 of the Constitution of Alabama of 1901 as interpreted by the Alabama Supreme Court in case law. The defendants contend the present existence of the school system and of the school board is provided by a *local* legislative act passed in 1919, Local Acts 1919, p. 73. In any event, there are five commissioners who run on a place-type ballot and are

[4] See *Board of School Commissioners* v. *Hahn*, 246 Ala. 662, 22 So. 2d 91, 92, 93, for a discussion of the history and continuance of the school system in Mobile and Alabama.

[5] Article XIV, Section 270 of the Constitution of 1901:

> "The provisions of this article and of any act of the legislature passed in pursuance thereof to establish, organize, and maintain a system of public schools throughout the state, shall apply to Mobile County only so far as to authorize and require the authorities designated by law to draw the portions of the funds to which said county shall be entitled for school purposes and to make reports to the superintendent of education as may be prescribed by law; and all special incomes and powers of taxation as now authorized by law for the benefit of public schools in said county shall remain undisturbed until otherwise provided by the legislature; provided, that separate schools for each race shall always be maintained by said school authorities."

elected by an at-large vote of the county. There is no requirement that each commissioner reside in a particular part of the county. The commissioners are elected on a staggered basis every two years for a six year term. The defendants Probate Judge, Circuit Clerk of Mobile County, and Sheriff, or persons appointed in their stead, by the Register in equity serve as the appointing board for election officials (Title 17, Secs. 120-26, *Code of Alabama* (1958) and as the Board of Election supervisors to certify election results. Id. Secs. 139, 139(1), 199, 209, 344).

In *Zimmer, aff'd. sub nom. East Carroll Parish School Board,* ("... but without approval of the constitutional views expressed by the court of appeals."), the Fifth Circuit synthesized the *White* opinion with the Supreme Court's earlier *Whitcomb* v. *Chavis,* 403 U.S. 124, 91 S. Ct. 1858, 29 L.Ed.2d 363 (1971) decision, together with its own opinion in *Lipscombe* v. *Jonsson,* 459 F.2d 335 (5th Cir. 1972) and set out certain factors to the considered.

Based on these factors as set out in *Zimmer,* 485 F.2d at 1305, the court makes the following findings with reference to each of the primary and enhancing factors:

LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIDATE SELECTION PROCESS TO BLACKS.

Mobile County blacks were subjected to massive official and private racial discrimination until the Voting Rights Act of 1965.[6] It has only been since that time that significant dimunition of these discriminatory practices has been made. The overt forms of many of the rights now exercised by all Mobile County citizens were secured through national legislation, federal court orders, and a moral commitment of many dedicated white and

[6] In the companion case, *Bolden* v. *City of Mobile,* the evidence was uncontradicted that in 1946 there were only approximately 255 black registered voters out of more than 19,000 registered voters.

black citizens plus the power generated by the restoration of the right to vote which substantially increased the voting power of the blacks. Public facilities are open to all persons. The pervasive effects of past discrimination still substantially affect political black participation.

There are no formal prohibitions against blacks seeking office in Mobile County.[7] Since the Voting Rights Act of 1965, blacks register and vote without hindrance. The election of the school commissioners is partisan and black and whites participate in both parties. However, the court has a duty to look deeper rather than rely on surface appearance to determine if there is true openness in the process and determine whether the processes "leading to nomination and election [are]. . . equally open to participation by the group in question. . . ." *White,* 412 U.S. at 766. One indication that local political processes are not equally open is the fact that no black person has ever been elected to the at-large school board. This is true although the black population level is almost one-third.

In the 1960's and 1970's, there has been general polarization in the white and black voting. The polarization has occurred with white voting for white and black for black if a white is opposed to a black, or if the race is between two white candidates and one candidate is identified with a favorable vote in the black wards, or identified with sponsoring particularized black needs. When this occurs, a white backlash occurs which usually results in the defeat of the black candidate or the white candidate identified with the blacks.

Since 1962, four black candidates have sought election in the at-large county school board election. Dr. Goode in 1962, Dr. Russell in 1966, Ms. Jacobs in 1970, and Ms. Gill in 1974.

[7] The qualifying fee for candidates for the city commission was found unconstitutional in *Thomas* v. *Mims,* 317 F. Supp. 179 (S.D. Ala. 1970). See also *U.S.* v. *State of Ala.,* 252 F. Supp. 95 (M.D. Ala. 1966) (three judge district court panel) (poll tax declared unconstitutional).

All of these black candidates were well educated and highly respected members of the black community. They all received good support from the black voters and virtually no support from whites. They all lost to white opponents in run-off elections.

Three black candidates entered the race of the Mobile City Commission in 1973. Ollie Lee Taylor, Alfonso Smith, and Lula Albert. They received modest support from the black community and virtually no support from the white community. They were young, inexperienced, and mounted extremely limited campaigns.

Two black candidates sought election to the Alabama State Legislature in an at-large election in 1969. They were Clarence Montgomery and T. C. Bell. Both were well supported from the black community and both lost to white opponents.

Following a three-judge federal court order in 1972[8] in which single-member districts were established and the house and senate seats reapportioned, one senatorial district in Mobile County had an almost equal division between the black and white population. A black and white were in the run-off. The white won by 300 votes. There were no overt acts of racism. Both candidates testified and asserted each appealed to both races. It is interesting to note that the white winner published a simulated newspaper with both candidate's photographs appearing on the front page, one under the other, one white, one black.

One city commissioner, Joseph N. Langan, who served from 1953 to 1969, had been elected and reelected with black support until the 1965 Voting Rights Act enfranchised large numbers of blacks. His reelection campaign in 1969 foundered mainly because of the fact of the backlash from the black support and his identification with attempting to meet the particularized needs of the black people of the city. He was

[8] *Sims v. Amos,* 336 F. Supp. 924 (M.D. Ala. 1972).

again defeated in an at-large county commission race in 1972. Again the backlash because of the black support substantially contributed to his defeat.

In 1969, a black got in a run-off against a white in an at-large legislature race. There was an agreement between various white prospective candidates not to run or place an opponent against the white in the run-off so as not to splinter the white vote. The white won and the black lost.

Practically all active candidates for public office testified it is highly unlikely that anytime in the foreseeable future, under the at-large system, that a black can be elected against a white. Most of them agreed that racial polarization was the basic reason. The plaintiffs introduced statistical analyses known as "regression analysis" which supported this view. Regression analysis is a professionally accepted method of analyzing data to determine the extent of correlation between dependent and independent variables. In plaintiffs' analyses, the dependent variable was the vote received by the candidates studied. Race and income were the independent variables whose influence on the vote received was measured by the regression. There is little doubt that race has a strong correlation with the vote received by a candidate. These analyses covered every city commission race in 1965, 1969, and 1973, both primary and general election of county commission in 1968 and 1972, and selected school board races in 1962, 1966, 1970, 1972, and 1974. They also covered referendums held to change the form of city government in 1963 and 1973 and a countywide legislative race in 1969. The votes for and against white candidates such as Joe Langan in an at-large city commission race, and Gerre Koffler, at-large county school board commission, who were openly associated with black community interests, showed some of the highest racial polarization of any elections.

Since the 1972 creation of single-member districts, three blacks of the present fourteen member Mobile County delegation have been elected. Their districts are more heavily populated with blacks than whites.

Prichard, an adjoining municipality to Mobile, which in recent years has obtained a black majority population, elected the first black mayor and first black councilman in 1972.

Black candidates at this time can only have a reasonable chance of being elected where they have a majority or a near majority. There is no reasonable expectation that a black candidate could be elected in a citywide election race because of race polarization. The court concludes that an at-large system is an effective barrier to blacks seeking public life. This fact is shown by the removal of such a barrier, i.e., the disestablishment of the multi-member at-large elections for the state legislature. New single member districts were created with racial compositions that offer blacks a chance of being elected, and they are being elected.

The court finds that the structure of the at-large election of school commissioners combined with strong racial polarization of the county's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process.

UNRESPONSIVENESS OF THE ELECTED SCHOOL COMMISSIONERS OF MOBILE COUNTY TO THE BLACK MINORITY.

The at-large elected county board members have not been responsive to the minorities' needs, who constitute 32.5% of the total population.

The Mobile County School System maintained a dual school system which prolonged segregation until sometime after *Davis* v. *Board of School Commissioners of Mobile County,* Civil Action No. 3003-63-H, was commenced in this court in 1963. The lengthy record in *Davis, supra,* is devastating evidence of the complete unresponsiveness and resistance on the part of the

Board to the particularized needs and aspirations of the black community.

This record (the docket sheet itself comprises some 27 pages. See Plaintiffs' Exhibit No. 99.) is replete with dilatory actions by the Board attempting to forestall the implementation of a desegregated school system. Another judge of this court was put in a position of having to compel the school Board to desegregate the school system against the Board's adamant refusal to respond voluntarily to black community interests and the prevailing law of the land. The record shows that on numerous occasions the court, faced with the complete failure of the Board to cooperate, had the unpleasant task of forcing the Board to carry out its lawful directives.

The Board usually acted only in response to numerous restraining and injunctive orders by the court. This occurred over a period of time covering more than a decade of litigation. The restraining orders were all of the same import, to wit, that the School Board follow the law as required by the Constitution.

> "The defendant, Board of School Commissioners of Mobile County and the other individual defendants . . . , be and they are hereby restrained and *enjoined from requiring and permitting segregation of the races* in any school under their supervision from and after such time as may be necessary to make arrangements for admission of children to such school on a racially nondiscriminatory basis with all deliberate speed, as required by the Supreme Court in *Brown* v. *Board of Education of Topeka*, 1954, 349 U.S. 294, 75 S. Ct. 753, 99 L.Ed. 1083." (Emphasis added.)[9]

> "It is ORDERED, ADJUDGED and DECREED that the *defendants*, their agents, officers, employees and successors and all those in active concert and participation with them, be and they are permanently *enjoined from discriminating* on the basis

[9] Order of July 11, 1963, M.E. No. 15,289.

> of race or color in the operation of the school system. *** [T]hey *shall take affirmative action to disestablish* all school segration and to eliminate the effects of the dual school system." (Emphasis added.)[10]

The utter frustration of the court over the repeated failure of the School Board to make a good faith effort to carry out its duties as to all of the students in the system was well articulated in an order of August 1, 1969 (M.E. No. 25,826), wherein the court stated:

> "With *eight years of litigation* entailing countless days and weeks of hearings in court, it has been clearly established that the Mobile County School *System must* forthwith *be operated in accordance with the law* of the land. What this school system needs is to educate children legally, and not engage in protracted litigation. After all, the children are the ones in whom we should be most interested."
> (Emphasis added.)

On March 16, 1970, this same judge, faced with the failure of the Board to carry out certain orders of this court entered pursuant to directives of the Fifth Circuit following rulings of the Supreme Court of the United States, entered an order which state in pertinent part:

> "The School Board is required to follow the *order* of this court of January 31, 1970, as amended and if the same is *not followed* within three days from this date, a *fine of $1,000 per day* is hereby assessed for each such day, against each member of the Board of School Commissioners."[11] (Emphasis added.)

[10] Order of April 7, 1969, M.E. No. 25,342. See also:

1. M.E. No. 15,555, dated 9/9/63
2. M.E. No. 25,274, dated 3/27/69
3. M.E. No. 26,553, dated 1/28/70
4. M.E. No. 27,705, dated 9/14/70

[11] M.E. No. 26,771, dated 3/16/70.

The Fifth Circuit has, in its numerous orders and opinions,[12] noted with displeasure, the total lack of cooperation exhibited by the Board. In *Davis II* (see n. 12, supra), it was stated:

> "Although it seems to be acknowledged on all hands that a *racially segregated system* is still *maintained,* the Defendants' legal position*** is that Plaintiffs have not set forth a claim entitling them to relief. So far as this record shows, the *Defendant* school authorities have *not* to this day ever *acknowledged* that (a) the present system is constitutionally invalid or (b) that there is any obligation on their part to make any changes at any time." 322F.2d at p. 358. (Emphasis added.)

In *Davis IV* (see n. 12, supra), the court said:

> "... [I]t must also be borne in mind that this school *board ignored for nine years* the requirement clearly stated in Brown that the School authorities have the primary responsibility for

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I. *Davis v. Bd. of School Comm. of Mobile County,* 318 F.2d 63 (1963)
II. *Davis,* 322 F.2d 356 (1963), cert. den. 375 U.S. 894, 84 S. Ct. 170, 11 L.Ed.2d 123; reh. den. 376 U.S. 928, 84 S. Ct. 656, 11 L.Ed.2d 628.
III. *Davis,* 333 F.2d 53 (1964), cert. den. 379 U.S. 844, 85 S. Ct. 85, 13 L.Ed.2d 49.
IV. *Davis,* 364 F.2d 896 (1966)
V. *Davis,* 393 F.2d 690 (1968)
VI. *Davis,* 414 F.2d 609 (1969)
VII. *Singleton v. Jackson Municipal Separate School Distrct.,* 419 F.2d 1211 (1969)
VIII. *Davis,* 422 F.2d 1139 (1970)
IX. *Davis,* 430 F.2d 883 (1970); on remand 430 F.2d 889; aff. in part, rev. in part, 402 U.S. 33, 91 S. Ct. 1289, 28 L.Ed.2d 577
X. *Davis,* 483 F.2d 1017 (1973)
XI. *National Education Ass. v. Board of School Comm. of Mobile County,* 483 F.2d 1022 (1973)
XII. *Davis,* 496 F.2d 1181 (1974)
XIII. *Davis,* 517 F.2d 1044 (1975)
XIV. *Davis,* 526 F.2d 865 (1976)

> solving this constitutional problem." 364 F.2d at 898, n. 1. (Emphasis added.)

In *Davis V* (see n. 12, *supra*), the Fifth Circuit stated, through Judge Thornberry:

> "In the last Mobile case, Judge Tuttle said *there must 'be an end to* the present policy of hiring and assigning teachers according to race by the time the last of the schools are fully desegregated for the school year 1967-68.' 364 F.2d at 904. ... [D]espite the court's decree, it seems apparent that the policy of hiring and *assigning teachers according to race* still exists.*** The reason for the lack of progress is that the board has not yet shouldered the burden." 393 F.2d at 695. (Emphasis added.)

Further evidence is contained in *Davis IX* (see n. 12, *supra*), where, on page 886, it is stated:

> "The Mobile County School *System has* almost *totally failed to comply* with the faculty ratio requirement although ordered to do so by the district court on August 1, 1969." (Emphasis added.)

Further, it was pointed out in note 4 thereof, in discussing desegregation plans:

> "... but the *defendants,* the only parties in possession of current and accurate information, have *offered no help.* This lack of cooperation and generally *unsatisfactory* condition created by defendants, should be terminated at once by the district court." 430 F.2d at p. 888. (Emphasis added.)

There are, to date, many unresolved controversies remaining in *Davis.* There is no doubt that with a more cooperative School Board making a more responsive effort to conform to the law, the process of implementing a constitutionally acceptable unitary school system would have been accomplished faster and without the divisiveness, and lengthy and expensive litigation already experienced.

Today, thirteen years after the filing of the *Davis* case, the Board is operating under "A Comprehensive Plan for a Unitary School System" order of this court issued pursuant to a mandate of the Supreme Court of the United States and of the

Fifth Circuit Court of Appeals. Under these circumstances, the defendants can justly claim little credit for this alleged responsiveness today to black needs.

THERE IS NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS.

There is no clear cut *State* policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole. The lack of State policy therefore must be considered as a neutral factor.

In considering the State policy with specific reference to Mobile, the Mobile County School System was established in 1826, the first provision for a "public" school system in the State.[13] The commissioners were to be elected at-large. In 1854, the first general public school system for the State of Alabama was enacted.[14] Section 2 of Article VI of that Act recognized and maintained the Mobile County School System separate and apart from the school system for the State. This was incorporated in the Constitution of 1875 and the Constitution of 1901, Sec. 270 of Article XIV. The at-large election of the Mobile County School Commissioners has continued to the present time. The manifest policy of Mobile County has been to have at-large or multi-member districting.

PAST RACIAL DISCRIMINATION.

Prior to the Voting Rights Act of 1965, there was effective discrimination which precluded effective participation of blacks in the elective system in the State, including Mobile County.

One of the primary purposes of the 1901 Constitutional Convention of the State of Alabama was to disenfranchise the blacks. The Convention was singularly successful in this

[13] Acts of Alabama, 1825-26, p. 35. This Act provided for not less than thirteen nor more than twenty-five commissioners.

[14] Acts of Alabama, 1853-54, p. 8.

objective. The history of discrimination against blacks' participation, such as the cumulative poll tax, the restrictions and impediments to blacks registering to vote, is well established.

Local discrimination in the city and the county has been established in connection with the lawsuits concerning racial discrimination arising in this court, to wit, *Allen v. City of Mobile,* 331 F. Supp. 1134, (S/D Ala. 1971, aff'd. 466 F.2d 122 (5th Cir. 1972), cert. den. 412 U.S. 909 (1973); *Anderson v. Mobile County Commission,* Civil Action No. 7388-72-H (S/D Ala. 1973); *Sawyer v. City of Mobile,* 208 F. Supp. 548 (S/D Ala. 1961); *Evans v. Mobile City Lines, Inc.,* Civil Action No. 2193-63 (S/D Ala. 1963); and *Cook v. City of Mobile,* Civil Action No. 2634-63 (S/D Ala.). *Preston v. Mandeville,* 479 F.2d 127 (5th Cir. 1973), was a countywide case involving racial discrimination of Mobile's jury selection practices. *Smith v. Allwright,* 321 U.S. 649, 64 S. Ct. 757, 88 L.Ed. 987 (1944) (white primaries) was applicable to Alabama and some Alabama cases of discrimination are *Davis v. Schnell,* 81 F. Supp. 872 (S/D Ala. 1949), aff'd. 336 U.S. 933, 69 S. Ct. 749, 93 L.Ed. 1093 (1949), ("interpretation" tests for voter registration), *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960) (racial gerrymandering of local government), *Reynolds v. Sims,* 377 U.S. 533, 84 S. Ct. 1362, 12 L.Ed.2d 506 (1964) (racial gerrymandering of state government), and *U.S. v. Alabama,* 252 F. Supp. 95 (M/D Ala. 1966) (Alabama poll tax).

The racial polarization existing in the city and county elections has been discussed herein. The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners.

In the 1950's and early sixties, prior to the Voting Rights Act of 1965, only a relatively small percentage of blacks were registered to vote in the county.[15] Since the Voting Rights Act, the blacks have been able to register to vote and become candidates.

[15] In the 1950's and 1960's, the impediments placed in the registration of the blacks to vote were not as aggravated in Mobile County as in some counties. It was not necessary for voter registrars

(footnote continued)

ENHANCING FACTORS.

With reference to the enhancing factors, the court finds as follows:

(1) The countywide election encompasses a large district. Mobile County has an area of 1,240 square miles with a population of 317,308 in 1970 and an estimated population of 337,200 in 1976.

(2) There is a majority vote requirement for the school commissioners in the primaries.

(3) There is no anti-single shot voting provision but the candiates run for positions by place or number.[16]

(4) There is a lack of provision for the at-large candidates to run from a particular geographical sub-district, as well as a lack of residence requirement.

The court concludes that in the aggregate, the at-large election structure as it operates in the countywide election of the school commissioners of Mobile County substantially dilutes the black vote in these elections.

CONCLUSIONS OF LAW

I.

The court addresses itself first to the contention of the defendants that the plaintiffs are not entitled to relief because they do not come before the court with clean hands because they thwarted the efforts of the school commissioners to procure

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(footnote continued)
to be sent to Mobile to enable blacks to register. However, as previously noted, in 1946 only 255 blacks out of over 19,000 voters were registered.

[16] The influence of this enchancing factor is minimal. It is this writer's opinion, born out of 15 years experience in a State judicial office subject to the electoral process, that the public's best interest is served, and it can make more intelligent choices, when candidates run for numbered positions. The choices between candidates are narrowed for the voter and they can be compared head to head.

passage by the State Legislature of a *constitutionally* sound statute pending in the 1976 legislature providing for reapportionment of the Board into five single-member districts. These defendants further contend that the Legislature has demonstrated a willingness to pass a constitutionally sound statute providing for reapportionment of the school board into five single-member districts and that this function should be left to the Legislature.

The complaint in this cause was filed in June of 1975. The State Legislature in the summer months of 1975 passed a *local* act reapportioning the Board membership into five single-member districts which these defendants claim they supported. The Board members were dismissed as parties defendant. Shortly thereafter, these defendants sought a declaratory judgment in the State court as to whether or not the local act was constitutional. The State court declared the act was fatally defective because of the manner in which the act was published.[17]

On March 8, 1976, the plaintiffs sought and received leave to add the Board members as parties defendant by an amended complaint. These defendants were served March 19, 1976.

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[17] Article IV, Sec. 106 of the Constitution of 1901:

"Sec. 106. No special, private, or local law shall be passed on any subject not enumerated in section 104 of this Constitution, except in reference to fixing the time of holding courts, unless notice of the intention to apply therefor shall have been published, without cost to the state, in the county or counties where the matter or thing to be affected may be situated, which notice shall state the substance of the proposed law and be published at least once a week for four consecutive weeks in some newspaper published in such county or counties, or if there is no newspaper published therein, then by posting the said notice for four consecutive weeks at five different places in the county or counties prior to the introduction of the bill; and proof by affidavit that said notice has been given shall be exhibited to each house of the legislature, and said proof spread upon the journal. The courts shall pronounce void every special, private, or local law which the journals do not affirmatively show was passed in accordance with the provisions of this section."

They failed to plead. On July 12, the plaintiffs filed a motion for a default judgment. On that date, the Board members filed an answer and responded to the motion for default judgment. The case was set for trial July 19, 1976. It was continued at the request of these defendants.[18] The case was reset for trial September 9, 1976. On September 2, 1976, these defendants filed a motion to sever and to dismiss or continue.[19] On September 9, 1976, these defendants filed a motion to stay pending certification for interlocutory appeal and a motion to stay pending appeal, all of which were denied. Beginning with these defendants' response to motion for default judgment and in connection with other motions herein mentioned, these Board members have contended they were making a good faith effort to get a *constitutionally sound legislative* enactment passed in the 1976 Legislature but the plaintiffs blocked passage of the bill. They sought a continuance until the legislature meets again in 1977 to give that legislature an opportunity to pass a constitutionally sound bill dividing the school board into five single-member districts. Although the language varied in motion to motion and document to document, the thrust of each motion was that single-member districts could be provided for by the legislature. The September 2 motion to sever and dismiss and continue by these defendants used this language:

> "Despite the efforts of these defendants, the bill was not passed into law but was blocked by the negative votes of three members of the Mobile County legislative delegation.",

all of whom were black and within the plaintiff class. On the last page of the motion, this language was used:

> "And the Board of School Commissioners of Mobile County can be reapportioned into five single member districts meeting all *consitutional* standards by the *normal legislative* process. . . ." (Emphasis added.)

The same, or substantially the same language was used in the September 9 motion for a stay pending appeal. In a proposed Findings of Fact and Conclusions of Law prepared by these defendants in pursuance of this court's pretrial order, on the last two pages this language was used:

[18] See "Appendix A."

[19] See n. 18, *supra*, "Appendix A."

> "The Legislature of the State of Alabama has demonstrated its willingness, without intervention by this court, to provide a constitutionally sound system of governance for the Mobile County Public School System. . . ."

and

> ". . . plaintiffs have on at least one occasion blocked the good faith efforts to the defendant School Board to procure passage by the State Legislature of a *constitutionally* sound *statute* providing for reapportionment of the School Board into five single-member districts." (Emphasis added.)

In a trial memorandum of these defendants, page 26, it was stated:

> ". . . it is entirely clear that the legislative remedy is available."

This brief was filed September 2.

The evidence before the court indicated that the black legislators from this county became concerned with whether or not the proposed act pending in the 1976 legislature would be constitutionally sound. During closing arguments in this cause, the provisions of the 1901 Constitution, Sec. 270[20] were discussed. The court directed an inquiry to counsel for these defendants whether or not it was his contention and belief that the at-large system could be constitutionally changed by the bill pending in the 1976 legislature. He answered no because the bill was a *general* bill, citing Alabama Supreme Court authorities, which he contended supported his position. This was the first notice the court had that the legal position of counsel for these defendants was that the single-member district bill as drafted and presented to the 1976 legislature could not be constitutionally enacted. In the post-trial memorandum filed by these defendants September 29, 1976, p. 4, it was stated:

> ". . . and *general* Acts of the Legislature relating to school matters have no applicability to the Mobile County Public School system by virtue of the provisions of § 270 of the Constitution of Alabama of 1901." (Emphasis added.)

[20] See n. 5, *supra*.

These defendants had persistently contended the 1976 bill was the same as the 1975 Act. It was not. According to these defendants now, there is a vital difference. The 1975 Act was a *local* act, the proposed 1976 Act was a *general* act. These developments explode these defendants' contention that the plaintiffs do not come into court with clean hands. Clearly, these defendants were trying to place the shoe on the wrong foot. The court takes judicial notice of the lack of cooperation and dilatory practices of the School Board in the past in the *Birdie Mae Davis* case.

II.

There is a threshold question faced by this court in whether or not *Washington v. Davis,* U.S. , 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976), is dispositive of this case so as to preclude an application of the factors determinative of voter dilution as set forth in *White* and *Zimmer,* aff'd. *sub nom. East Carroll Parish School Board.*

It is the defendants' contention that *Washington* makes it clear that to prevail the plaintiffs must prove that the statute establishing the at-large election was *adopted* with a discriminatory *purpose.* They assert that the present existence of the five member Board and their at-large election on a staggered basis every two years is provided for by a *local* Act enacted in 1919, and at that time the blacks were disenfranchised. If the court accepted the plaintiffs' contention that the 1939, etc. Acts, *general* acts, are the statutes the Board is operating under, it would make no difference because the blacks were effectively disenfranchised at the time of those enactments. Therefore, this court need not determine the Alabama constitutional question, to wit, does it take a *local* act or a constitutional amendment to change the present make-up of the Board and the manner by which they are elected. It is reasoned in either event that the at-large system of electing school commissioners when adopted had no relation to minimizing or diluting the black vote because there was none.

The plaintiffs contend that *Washington did not establish a new Supreme Court purpose* test.

The thrust of the defendants' argument is that if the 1919 statute (or by implication, the 1939, etc. Acts) creating the present Board and their election at-large was neutral on its face *Washington does not* permit this court to consider other evidence or factors and must decide for the school commissioners. It is argued that *Washington* is a benchmark decision requiring this finding in the multi-member at-large school commissioners' election.

The school commissioners contend the board membership and at-large election was provided for by either of these statutes enacted during a period of time when the blacks were substantially disenfranchised in the State of Alabama. One of the primary purposes of the 1901 Constitutional Convention was to disenfranchise the blacks.[21]

The court, therefore, will proceed to examine *Washington* on the proposition that the present school board membership and at-large election was provided for by either the 1919 or 1939, etc. Acts of the Legislatures.

Washington upheld the validity of a written personnel test administered to prospective recruits by the District of Columbia Police Department. It had been alleged the test "excluded a disportionately high number of Negro applicants." *Id.* at 2044. The petitioners claimed the effect of this disportionate exclusion violated their Fifth Amendment due process rights and 42 U.S.C. § 1981. *Id.* at 2044. Evidence indicated that four times as many blacks failed to pass the test as whites. Plaintiffs contended the impact in and of itself was sufficient to justify relief. They made no claim of an intent to discriminate. The District Court found no intentional conduct and refused relief.

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[21] The history of Alabama indicates that there was a populist movement at that time which sought to align the blacks and the poor whites. The Bourbon interest of the State sought to disenfranchise the poor whites, along with the blacks, but were unsuccessful, excepting the cumulative feature of the poll tax. They were singularly successful disenfranchising the blacks. The 1901 Constitution had this provision about the Mobile School system: "... provided, that separate schools for each race shall always be maintained by said school authorities." N. 5, *supra.*

The Circuit Court reversed, relying upon *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L.Ed.2d 158 (1971). *Griggs* was a Title VII action (42 U.S.C. § 2000e, *et seq.*) in which the racially discriminatory impact of employment tests resulted in their invalidation by the court.

The Supreme Court in *Washington* reconciled its decision with several previous holdings, distinguished some, and expressly overruled some cases in which there were possible conclusions different from *Washington.*

They made *no reference to the recent pre-Washington* cases of its or appellate courts' voting dilution decisions dealing with at-large or multi-member versus single-member districts, and, in particular, no mention was made of the cardinal case in this area, *White* v. *Regester,* 412 U.S. 755, 93 S. Ct. 2332, 37 L.Ed.2d 314, (1973) nor to *Dallas* v. *Reese,* 421 U.S. 477, 95 S. Ct. 1706, 44 L.Ed.2d 312, (1975), and *Chapman* v. *Meier,* 420 U.S. 1, 95 S. Ct. 751, 42 L.Ed.2d 766 (1975), nor to *Zimmer,* which the Court had affirmed only a few months before, nor to *Turner* v. *McKeithen,* 490 F.2d 191 (5th Cir. 1975). No reference was made to *Fortson* v. *Dorsey,* 379 U.S. 433, 85 S. Ct. 498, 13 L.Ed.2d 401 (1965), to *Reynolds,* nor to *Whitcomb. Whitcomb,* 403 U.S. at 143, recognized that in an at-large election scheme, a showing that if in a particular case the system operates to minimize or cancel out the voting strength of racial or political elements, the courts can alter the structure. Had the Supreme Court intended the *Washington* case to have the far reaching consequences contended by defendants, it seems to this court reasonable to conclude that they would have made such an expression.

There are several reasons which may be plausibly advanced as to why the *Washington* Court did not expressly overrule nor discuss these cases. Courts are not prone to attempt to decide every eventuality of a case being decided or its effect on all previous cases. The Court may have desired that there be further development of the case law in the district and circuit courts before commenting on the application of *Washington* to this line of cases. The cases may be distinguishable and reconcilable with the expressions in *Washington.* Or, it may not have been the intention of the *Washington* Court to include these cases within the ambit of its ruling.

Washington spoke with approval of *Wright* v. *Rockefeller,* 376 U.S. 52, 84 S. Ct. 603, 11 L.Ed.2d 512 (1964), reh. den. 376 U.S. 959, 84 S. Ct. 964, 11 L.Ed.2d 977, setting out the "intent to gerrymander" requirement established in *Wright. Washington,* at 2047-48.

Wright was the direct descendant of *Gomillion* v. *Lightfoot,* 364 U.S. 339, 81 S. Ct. 125, 5 L.Ed.2d 110 (1960). These two cases involved racial gerrymandering of political lines. *Gomillion* dealt with an attempt by the Alabama legislature to exclude most black voters from the municipal limits of Tuskegee so whites could control the election. The court found that the State of Alabama impaired the voting rights of black citizens while cloaking it in the garb of the realignment of political subdivisions and held there was a violation of the Fifteenth Amendment. *Gomillion,* at 345. There was no direct proof of racial discriminatory intent. Justice Stevens in his concurring opinion noted with approval, "... when the disproportion [ate impact] is as dramatic as in *Gomillion* . . . , it really does not matter whether the standard is phrased in terms of *purpose or effect." Washington,* at 2054.[22] (Emphasis added.)

Wright dealt with the issue of congressional redistricting of Manhattan. The plaintiffs alleged racially motivated districting. The congressional lines drawn created four districts. One had a large majority of blacks and Puerto Ricans. The other three had large white majorities. The court held the districts were not unconstitutionally gerrymandered upon the finding that "...

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[22] In *Paige* v. *Gray,* 538 F.2d 1108 (5th Cir. 1976), black citizens of Albany, Georgia, brought an action to invalidate the at-large system of electing city commissioners. At 1110, n.3, the court noted the above quote by Justice Stevens, but in the body of the opinion expressed concern with unlawful motive for discriminatory purpose as required by *Washington.* However, at 1110, the court stated "the validity of Albany's change from a ward to an at-large system can best be handled by applying the multifactor test enunciated in . . . *White* v. *Regester* . . . and *Zimmer* v. *McKeithen." Paige,* at 1111, stated *Zimmer* still "sets the basic standard in this circuit."

the New York legislature was [not] motivated by racial considerations or in fact drew the districts on racial lines." *Wright,* 376 U.S. at 56. This set forth the principle that in gerrymandering cases in order for the plaintiffs to obtain relief they must show racial motivation in the drawing of the district lines.

Washington then quoted with approval from *Keyes* v. *School District No. 1,* 413 U.S. 189, 93 S. Ct. 2686, 37 L.Ed.2d 548 (1973), indicating a distinction or reconciliation of that case with *Washington.* There had not been racial purpose or motivation *ab initio* in *Keyes. Keyes* was a Denver, Colorado, school desegregation case. Denver schools had never been segregated by force of state statute or city ordinance. Nevertheless, the majority found that the *actions* of the School Board during the 1960's were sufficiently indicative of "... [a] purpose or intent to segregate" and a finding of *de jure* segregation was sustained. *Keyes,* at 205, 208. That court held that to find overt racial considerations in the *actions* of government officials is indeed a difficult task.[23]

Washington further commented:

> "... an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington,* 96 S. Ct. at 2049.

The plaintiffs contend that *Washington's* discussion with approval of the *Keyes* case permits the application of the "tort" standard in proving intent. In his concurring opinion, Justice Stevens discussed this point:

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[23] In another Fifth Circuit case it was held that if an official is motivated by such wrongful intent, he or she

> "... will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive—for we deal with an area in which 'subtleties of conduct... play no small part.'" *U.S.* v. *Texas Ed. Agency,* 532 F.2d 380, 388, (5th Cir. 1976) (Austin II) (school desegregation).

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For *normally the actor is presumed to have intended the natural consequences of his deeds.* This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decision-making, and of mixed motivation." *Washington,* 96 S. Ct. at 2054. (Emphasis added.)

The plaintiffs contend this circuit's use of the tort standard of proving intent squares with the above statements. This circuit for several years has accepted and approved the tort standard as proof of segregatory intent as a part of state action in school desegregation findings. *Morales* v. *Shannon,* 516 F.2d 411, 412-13 (5th Cir. 1975), *cert. den.* 423 U.S. 1034 (1975).

Recently, citing *Morales, supra, Cisneros* v. *Corpus Christi Independent School District,* 467 F.2d 142 (5th Cir. 1972) (en banc), *cert. den.* 413 U.S. 920 (1973), reh. den. 413 U.S. 922 (1973), and *United States* v. *Texas Educational Agency,* 467 F.2d 848 (5th Cir. 1972) (en banc) (Austin I), the Fifth Circuit in *U.S.* v. *Texas Education Agency,* (Austin Independent School District) 532 F.2d 380 (5th Cir. 1976) (Austin II) squarely addressed the meaning of discriminatory intent in the following language:

> "Whatever may have been the originally intended meaning of the test we applied in *Cisneros* and *Austin I* [*U.S.* v. *Texas Education Agency, supra,*] we agree with the intervenors that, after *Keyes,* our two opinions must be viewed as incorporating in school segregation law the ordinary rule of tort law that a person intends the natural and foreseeable consequences of his actions.
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> • • •
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> "Apart from the need to conform *Cisneros* and *Austin I* to the supervening *Keyes* case, there are other reasons for attributing responsibility to a state official who should reasonably foresee the segregative effects of his actions. First, it is difficult—and often futile—to obtain direct evidence of the official's intentions. .... Hence, courts usually rely on circumstantial evidence to ascertain the decisionmakers' motivation." *Id.* at 388.

This court in its findings of fact has held that when the 1919 statute and the 1939, etc. Acts were enacted, the blacks were disenfranchised and here concludes the statutes on their respective faces were neutral. This is in line with Fifth Circuit opinions, *McGill* v. *Gadsden Co. Commission,* 535 F.2d 277 (5th Cir. 1976), *Wallace* v. *House,* 515 F.2d at 633 (5th Cir. 1975), vacated U.S. , 96 S. Ct. 1721, 48 L.Ed.2d 191 (1976). No. 74-2654 (5th Cir., Sept. 17, 1976), affirmed the District Court and *Taylor* v. *McKeithen,* 499 F.2d 893, 896 (5th Cir. 1974). However, in the larger context, the evidence is clear that one of the primary purposes of the 1901 constitutional convention was to disenfranchise the blacks.

Therefore, the legislature in 1919 and 1939, etc. Acts was acting in a race-proof situation. There can be little doubt as to what the legislature would have done to prevent the blacks from effectively participating in the political process had not the effects of the 1901 constitution prevailed. The 1901 constitution and the subsequent statutory schemes and practices throughout Alabama, until the Voting Rights Act of 1965, effectively disenfranchised most blacks.

A legislature in 1919, little more than 50 years after a bitter and bloody civil war which resulted in the emancipation of the black slaves, or a legislature in 1939, etc., should have reasonably expected that the blacks would not stay disenfranchised. It is reasonable to hold that the present dilution of black Mobilians is a natural and foreseeable consequence of the at-large election system imposed.

Under Alabama law, the legislature is responsible for passing acts modifying the form of city and county governments. Mobile County elects or has an effective electoral voice in the election of eleven members of the House and three senators. The state legislature observes a courtesy rule, that is, if the county delegation unanimously endorses local legislation, the legislature perfunctorily approves all local county legislation. The Mobile County Senate delegation of three members operates under a courtesy rule that any one member can veto

any local legislation. If the Senate delegation unanimously approves the legislation, it will be perfunctorily passed in the State Senate. The county House delegation does not operate on an unanimous rule as in the Senate, but on a majority vote principle, that is, if the majority of the House delegation favors local legislation, it will be placed on the House calendar but will be subject to debate. However, the proposed county legislation will be perfunctorily approved if the Mobile County House delegation unanimously approves it. The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to the black voters passing until the State was redistricted by a federal court order.[24] There are now three blacks on the eleven member House legislative delegation. This resulted in passage in the 1975 legislature of a bill doing away with the at-large election of the County Board of School Commissioners and creating five single-member districts. This was promptly attacked by the all-white at-large elected County School Board Commission in the State court. The act was declared unconstitutional.

This natural and foreseeable consequence of the 1919 Act, or the 1939, etc. Acts, black voter dilution, was brought to fruition in a few years, the middle 1960's, and continues to the present. This court sees no reason to distinguish a school desegregation case from a voter discrimination case. It appears to this court that the evidence supports the tort standard as advocated by the plaintiffs. However, this court prefers not to base its decision on this theory. This court deems it desirable to determine if the far-reaching consequences of *Washington* as advanced by the defendants is correct without regard to *Keyes.* This court is unable to accept such a broad holding with such far-reaching consequences.

The case *sub judice* can be reconciled with *Washington.* The *Washington* Court, in Justice White's majority opinion, included the following:

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[24] *Sims* v. *Amos,* 336 F. Supp. 924 (M/D Ala. 1972).

> "This is not to say that the necessary discriminatory racial purpose must be express or appear on the face of the statute, or that a law's disportionate impact is irrelevant in cases involving Constitution-based claims of racial discrimination. A statute, otherwise neutral on its face, must not be applied so as invidiously to discriminate on the basis of race. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886)." *Washington*, 96 S. Ct. at 2048.

To hold that the 1919, or 1939, etc. Acts while facially neutral would defeat rectifying the invidious discrimination on the basis of race which the evidence has shown in this case would fly in the face of this principle.

It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an "unequal application of the law. . . as to show intentional discrimination." *Atkins* v. *Texas*, 325 U.S. 398, 404, 65 S. Ct. 1276, 89 L.Ed. 1692 (1945) and the deliberate systematic denials to people from juries because of their race, *Carter* v. *Jury Commission*, *Cassell* v. *Texas*, *Patton* v. *Mississippi*, cited in *Washington*, at 2047, to a present purpose to dilute the black vote as evidenced in this case. There is a "current" condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes*. *Washington*, at 2048.

More basic and fundamental than any of the above approaches is the factual context of *Washington* and this case. Initial discriminatory purpose in employment and in redistricting is entirely different from resulting voter dilution because of racial discrimination. *Washington's* failure to expressly overrule or comment on *White*, *Dallas*, *Chapman*, *Zimmer*, *Turner*, *Fortson*, *Reynolds*, or *Whitcomb*, leads this court to the conclusion that *Washington* did not overrule those cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination.

III.

In order for this court to grant relief as prayed for by plaintiffs, it must be shown that the political process was not

open equally to the plaintiffs as a result of dilution of voting strength and consequently the members of the class had less opportunity to participate in the political process and elect representatives of their choice. *Chapman*, 420 U.S. at 18, and *Whitcomb*. "Access to the political process and not [the size of the minority] population" is the key determinant in ascertaining whether there has been invidious discrimination so as to afford relief. *White*, 412 U.S. at 766; *Zimmer*, 485 F.2d at 1303.

The idea of a democratic society has since the establishment of this country been only a supposition to many citizens. The Supreme Court vocalized this realization in *Reynolds* where it formulated the "one person-one vote" goal for political elections. The precepts set forth in *Reynolds* are the substructure for the present voter dilution cases, stating that "every citizen has an inalienable right to full and effective participation in the political processes. . . ." *Reynolds*, 377 U.S. at 565. The Judiciary in subsequent cases has recongized that this principle is violated when a particular identifiable racial group is *not* able to fully and effectively participate in the political process because of the system's structure.

Denial of full voting rights range from outright refusal to allow registration, *Smith*, to racial gerrymandering so as to exclude persons from voting in a particular jurisdiction, *Gomillion*, to establishing or maintaining a political system that grants citizens all procedural rights while neutralizing their political strength, *White*. The last arrangement is maintained by the countywide at-large election of school commissioners.

Essentially, dilution cases revolve around the "quality" of respresentation. *Whitcomb*, 403 U.S. at 142. The touchstone for a showing of unconstitutional racial voter dilution is the test enunciated by the Supreme Court in *White*, 412 U.S. at 765: "Whether multi-member districts are "being used invidiously to cancel out or minimize the voting strength of racial groups." In *White*, for slightly different reasons in each county, the Supreme Court found that the multi-member districts in Dallas and

Bexar Counties, Texas, were minimizing black and Mexican-American voting strength.

Attentive consideration of the evidence presented at the trial leads this court to conclude that the present at-large countywide election of school commissioners impermissibly violates the constitutional rights of the plaintiffs by improperly restricting their access to the political process. *White,* 412 U.S. at 766; *Whitcomb,* 403 U.S. at 143. The plaintiffs have discharged the burden of proof as required by *Whitcomb.*

This court reaches its conclusion by collating the evidence produced and the law propounded by the federal appellate courts. The controlling law of this Circuit was enunciated by Judge Gewin in *Zimmer,* which closely parallels *Whitcomb* and *White.*[25] The *Zimmer* court, in an *en banc* hearing, set forth four primary and several "enhancing" factors to be considered when resolving whether there has been impermissible voter dilution. The primary factors are:

> "... a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case [for relief] is made." *Zimmer* at 1305. [footnotes omitted].

The enhancing factors include:

> "a showing of the existence of large districts majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Zimmer* at 1305 [footnotes omitted].

1. **LACK OF OPENNESS IN THE SLATING PROCESS OR CANDIATE SELECTION PROCESS TO BLACKS.**

Any person interested in running for school commissioner is able to do so.

[25] See also *Paige* v. *Gray,* 538 F.2d 1108 (5th Cir. 1976).

The system at first blush appears to be neutral, but consideration of facts beneath the surface demonstrate the *effects* which lead the court to conclude otherwise. No black has ever been elected school commissioner in Mobile County. The evidence indicates that black politicians who have previously been candidates in at-large elections and would run again in the smaller single-member districts, shy away from county at-large elections. One of the principal reasons is the polarizaiton of the white and black vote. The court is concerned with the effect of lack of openness in the electoral system in determining whether the multi-member at-large election system of the school commissioners is invidiously discriminatory.

In *White,* the Supreme Court expressed concern with any type of barrier to effective participation in the political process. *Zimmer,* 485 F.2d at 1305, n. 20, expressed its view in this language: "The standards we enunciate today are applicable whether it is a specific law or custom or practice which causes diminution of a minority voting strength."

There is a lack of openness to blacks in the political process in the school commissioners' election.

2. **UNRESPONSIVENESS OF THE ELECTED SCHOOL COMMISSIONERS TO THE BLACK MINORITY.**

It is the conclusion of the court that the countywide elected shool commissioners as practiced in Mobile County has not, and is not, responsive to blacks on an equal basis with whites; hence there exists racial discrimination. Past school boards have not only acquiesed to segregated folkways, but the County School Board has been in federal court continuously since 1963 to effect meaningful desegregation. *Davis v. Mobile County School Board,* Civil Action No. 3003-63 (S/D Ala.). During the course of this court's continuing jurisdiction in *Davis,* there have been 15 or more appeals to the Fifth Circuit. As hereinbefore set out, the Board has been repeatedly guilty of dilatory practices and it cannot justly claim credit for the

improvement of the school system today since they are operating under a court order and the watchful eye of the court in the implementation of that order.[26]

There has been a lack of responsiveness in employment and the operation of a dual school system. The disestablishment of that system and the establishment of a unitary system has been significantly slow. It is this court's opinion that leadership should be furnished in non-discriminatory hiring and promotion by our government, be it local, state, or federal.[27]

3. **NO TENUOUS STATE POLICY SHOWING A PREFERENCE FOR AT-LARGE DISTRICTS.**

The Alabama legislature has offered little evidence of a preference one way or the other for multi-member or at-large districts in its counties. This court finds state policy regarding multi-member at-large districting as neutral.

4. **PAST RACIAL DISCRIMINATION.**

It is this court's opinion that fair and effective participation under the present electoral system is, because of its structure,

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[26] All members of the school board just prior to the November 1976 election resided in metropolitan Mobile. Four members of the school board presently reside in metropolitan Mobile. There have been orders from this court against the City of Mobile or its departments to desegregate the police department, the golf course, public transportation, the airport, and an order affecting the City and County which attack racial discrimination, to wit, the *Allen, Anderson, Sawyer, Evans,* and *Cooke, supra,* cases.

[27] *Norman R. McLaughlin, etc.* v. *Howard H. Callaway, et al.,* Civil Action No. 74-123-P, S/D Ala., 9/30/74, at p. 22:

> "It is only fitting that the government take the lead in the battle against discrimination by ferreting out and bringing an end to racial discrimination in its own ranks."

Mobile has no ordinances proclaiming equal employment opportunity, either public or private, to be its policy. There are no non-discriminatory rental ordinances. On the one hand, the federal courts are often subjected to arguments by recalcitrant state and local officials of the encroachment of the federal bureaucracy and assert Tenth Amendment violations—while making no mention that were it not for such "encroachment" citizens would not have made the progress they have to fulfillment of equal rights. Recent history bears witness to this proposition.

difficult for the black citizens of Mobile County. Past discriminatory customs and laws that were enacted for the sole and intentional purpose of extinguishing or minimizing black political power is responsible. The purposeful excesses of the past are still in evidence today. Indeed, Judge Rives, writing for a three-judge panel finding the Alabama poll tax to be unconstitutional, stated forcefully:

> "'The long history of the Negroes' struggle to obtain the right to vote in Alabama has been trumpeted before the Federal Courts of this State in great detail. *** If this Court ignores the long history of racial discrimination in Alabama, it will prove that justice is both blind and deaf.' We would be blind with indifference, not impartiality, and deaf with intentional disregard of the cries for equality of men before the law." *U.S. v. State of Alabama,* 252 F. Supp. at 104 (M.D. Ala. 1966), [citing *Sims v. Baggett,* 247 F. Supp. 96, 108-09 (M.D. Ala. 1965)].

Without question, past discrimination, some of which continues to today as evidenced by the orders in several lawsuits in this court against the city and county, and demonstrated in the lack of access to the selection process and the school commissioners' unresponsiveness, contributes to black voter dilution.

5. **ENHANCING FACTORS.**

Zimmer, in addition to enumerating four substantial criteria in proving voter dilution, listed four "enhancing factors" that should be considered as proof of aggravated dilution.

a. *Large Districts.* The present at-large election system is as large as possible, i.e., the county. The county, with an area of 1,240 square miles and 317,308 persons, according to the 1970 Census, can reasonably be divided into election districts. It is common knowledge that numerous counties in the State have countywide officers such as county commissioners, divided into single-member districts and function reasonably well. It is large enough to be considered large within the meaning of this factor.

b. *Majority Vote Requirements.* There is a majority vote requirement for primary elections, Title 17, Sec. 366, *Code of Alabama* (1958). There is no such requirement in

the general election. Very rarely, if ever, have more than two persons opposed one another in a general election. As a practical matter, in the past, the effects of a majority vote have prevailed.

c. *Anti-single Shot Voting.* There is no anti-single shot voting provision in the present system of electing members of the Board. The Board members do run for a numbered place, Title 17, Sec. 153(1), *Code of Alabama* (1958). This place provision has to some extent the same result as the anti-single shot voting provision. At least in part, the practical results of an anti-single shot provision obtains in Mobile County.

d. *Lack of Residency Requirement.* The present system of election of the Board members does not contain any provision requiring that any commissioner reside in any specific district or one geographical area of the county.

IV.

The court has made a finding for each of the *Zimmer* factors, and most of them have been found in favor of the plaintiffs. The court has analyzed each factor separately, but has not counted the number present or absent in a "score-keeping" fashion.

The court has made a thoughtful, exhaustive analysis of the evidence in the record ". . . paying close attention to the facts of the particular situations at hand," *Wallace,* 515 F.2d at 631, to determine whether the minority has suffered an unconstitutional dilution of the vote. This court's task is not to tally the presence or absence of the particular factors, but rather, its opinion represents ". . . a blend of history and an intensely local appraisal of the design and impact of the multi-member district [under scrutiny] in light of past and present reality, political and otherwise." *White,* 412 U.S. at 769-70.

The court reaches its conclusion by following the teachings of *White, Dallas* v. *Reese,* 421 U.S. 477, 480, 95 S. Ct. 1706, 44 L.Ed.2d 312 (1975), *Zimmer, Fortson,* and *Whitcomb,* et al.

The evidence when considered under these teachings convinces this court that the at-large districts "operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Whitcomb,* 403 U.S. at 143, and *Fortson,* 379 U.S. at 439, and "operates impermissibly to dilute the voting strength of an identifiable element of the voting population,". *Dallas,* at 480. The plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors catalogued in *Zimmer.*

In summary, this court finds that the electoral structure, the multi-member at-large election of Mobile County School Commissioners, results in an unconstitutional dilution of black voting strength. It is "fundamentally unfair", *Wallace,* 515 F.2d at 630, and invidiously discriminatory.

The Supreme Court has laid down the general principle that "when District Courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter." *Connor v. Johnson,* 402 U.S. 690, 692, 91 S. Ct. 1760, 29 L.Ed.2d 268 (1971). The Court reaffirmed this twice in the last term. *East Carroll Parish School Board,* and *Wallace, supra.* Once the racial discriminatory evil has been established, as it was in *White,* the dilution occasioned by the multi-member at-large election requires the disestablishment of the multi-member at-large election and the obvious remedy is to establish single-member districts.

This court does not endorse the idea of quota voting or elections, nor of a weighted vote in favor of one race to offset racial prejudice or any other adversity. However, when the electoral structure of the government is such, as in this case, that racial discrimination precludes a black voter from an effective participation in the election system, a dilution of his and other black votes has occurred.

The moving spirit present at the conception of this nation, "all men are created equal," will not rest and the great purpose of the Constitution to "establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and

our Posterity . . ." will be only a dream until every person has an opportunity to be equal. To have this opportunity, every person must be treated equally. This includes being treated equally in the electoral process.

A county school commissioner election plan which includes small single-member districts will provide blacks a realistic opportunity to elect blacks to the Board of School Commissioners. No such realistic opportunity exists as the Board is presently structured. A single-member district plan would afford such an opportunity. Blacks' effective participation in the elective system will have the salutary effect of giving them a realistic opportunity to get into the mainstream in the operation of Mobile's school system which has a ratio range of 55 to 45, 60/40 white/black students. It will give them an opportunity to have an input and impact on the educational system. Good quality education equally available to all, (with the people having a compassionate concern, love, for one another) probably affords the best hope for a strong democracy and the sharing of this nation's economic and social benefits. It will afford an opportunity for a more meaningful dialogue between the whites and blacks to develop.

V.

There is a traditional constitutional tolerance of various forms of local government. See, e.g., *Abate* v. *Mundt,* 403 U.S. 182, 185, 91 S. Ct. 1904, 29 L.Ed.2d 399 (1971).

The court recognizes the "delicate issues of federal-state relations underlying this case." *Mayor of the City of Philadelphia,* 415 U.S. at 615.

The single-member districts have advantages other than correcting constitutional differences as found in this decree.[28]

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[28] *William Dove, Sr., et al. v. Charles E. Moore, et al.,* S.O. 75-1918 (8th Cir. 7/27/76), set out in footnote 3:

> "The author has previously discussed at length the undersirable characteristics of at-large elections and the benefits of single-member districts. *Chapman v. Meier,* 372 F. Supp. 371, 388-94 (D. N.D. 1974) (three-judge court) (Bright, J., dissenting), *majority reversed,* 420 U.S. 1 (1975). In the
>
> *(footnote continued)*

The court hereby adopts the plan, including the map designating the districts, submitted by the plaintiffs and attached as "Appendix B" and is part of this decree the same as if set out at length herein. This plan divides the county into five single-member districts. The lines are drawn along traditional precinct lines which will minimize voting conflicts. There is a maximum population variation in the districts of 6.3%.

(footnote continued)

> context of a discussion of proposed plans for the reapportionment of a state legislature, the dissent emphasized the following benefits of single-member districts:
>
> (1) It gives a voter a chance to compare only two candidates, head to head in making a choice.
>
> (2) It prevents one political party with a heavy plurality in one or two potential districts from dominating other potential districts that might narrowly go for the candidate of the opposite party.
>
> (3) It prevents a city wide political organization from ostracizing or disciplining a legislator, who dares stray from the machine's line.
>
> (4) It permits a citizen to identify a legislator as his senator and makes direct communication easier.
>
> (5) It makes each senator responsible for his actions and makes it difficult for a senator to fade into the ranks of "the team" to avoid being identified with specific actions taken.
>
> (6) It reduces campaign costs and "personalizes" a campaign.
>
> (7) It creates greater interest in the possibility of a citizen seeking a legislative seat without the political machine blessing.
>
> (8) It would diminish the animosity created in the legislature against multi-senate districts because of the tendency of senators elected by one political party from a city to vote as a bloc.
>
> (9) It would tend to guarantee an individual point of view if all senators are not elected as a team.
>
> (10) It would equalize the power of people in single senate districts with the people in the broken down multi-senate districts to *influence* the election of only one senator.
>
> [372 F. Supp. at 391 (footnote omitted) (emphasis in original).]

The court has stated repeatedly to the parties that it felt constrained to tinker with the present size of the membership and other features of the existing method of election as little as possible, i.e., require only that which is necessary to meet the constitutional mandates of this decree.

The Commissioners for Districts 3 and 4 will be elected in 1978. Commissioners for Districts 2 and 5 will be elected in November, 1980. The commissioner for District 1 will be elected in November, 1982. The commissioners will take office on the date as provided by the laws of the State of Alabama.

As the single-member districts are elected in the future, each school commissioner shall have been a resident of the district which that person represents for not less than 12 months immediately preceding that person's election and shall reside in the district during that person's term of office. All other qualifying and eligibility requirements should be that as provided by the laws of the State of Alabama. All other laws of the State of Alabama as apply to the Mobile County School System not in conflict with this order shall govern.

The Board since 1919 has been made up of five members. Various proposals have been made to enlarge the membership and designate when the new members should be elected. It is the court's considered judgment that changes made by the court should be minimal and only to correct constitutional deficiencies. For these reasons, the number of the members of the Board, the length of the term of office, and the staggered office terms and election, are to remain as provided by the legislature.

The plaintiffs desired a hearing far enough in advance of the November election for the court to make a decision, and if single-member districts were provided, that a special election be held prior to the 1976 general election with the winners of the various party elections being placed on the November general election ballot. If this was not done, they requested a special election be called after the general election.

The defendants desired that all elected members of the Board be allowed to serve out their respective terms until vacancies were created in sufficient number to fill the single-member districts predominantly populated by black voters.

Due to the time problems created by the dismissal, and later adding the school commissioners as defendants, the defendants would not have had sufficient time to prepare their defense, and the court would have been unable to make a reasoned judgment for elections to be held in 1976.

The court is unwilling to put the taxpayers to the expense of special elections, and the court is unwilling to deny the blacks the relief they are entitled to until 1980, a period of four years. The court is desirous of mitigating the adjustment and seeing that each elected member on the Board serves the longest possible period of time.

During the course of the trial, the court was advised by these defendants that they were interested in implementing a single-member district plan, shortening the litigation and reducing the expenses. They requested an opportunity for the defendants and plaintiffs to negotiate a compromise settlement. The parties indicated they desired some guidelines from court concerning when the election of single-member representatives would take place, and, if any of the elected members' terms would be shortened, which one. The court stated in substance the above election schedule and stated it appeared equitable to the court that if any member's terms were shortened, it should be those who had the least remaining time of service remaining on their six year term.

This approach continues to be the view of the court as an equitable solution. The present board members who will have the least remaining time of service, or who will have served most of their elected term at the time of the 1978 elections, will be Board members Alexander and Drago.

Under the ordered single-member district plan which requires residence in the district which the commissioner represents, the present Board members now reside in the districts as follows:

Commissioners Bosarge, Alexander, and Berger in District 2.

Commissioner Sessions in District 4.

Commissioner Drago in District 5.

No one resides in District 3 which has a majority black population and is entitled to a commissioner in 1978. Commissioner Sessions resides in District 4 which has a majority black population and is entitled to a place in 1978. Commissioner Sessions' term expires in 1978 and there will automatically be a vacancy for that district at that time.

In order for District 3 to have a place, one other Board member's term must be shortened or modified. Proceeding on the premises above stated of shortening or modifying members' terms who had the least remaining time of service, the choice narrows to Commissioners Alexander and Drago.

It appears more equitable to the court to modify one commissioner's powers and duties and allow that commissioner to complete his term rather than shorten it. For the remaining four commissioners, presently in office, after 1978, to complete their currently elected terms with new commissioners to be elected for Districts 3 and 4 in 1978, would make a Board consisting of six members. A six member board would lend itself to possible tie votes of three to three. The Board could be rendered ineffective under such conditions.

Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election in 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election in 1978, but will be occupied by either Commissioner Alexander or Drago.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve until the general election in 1980, and the successors for the two places elected in 1980 have qualified and taken office. The Chairman to be elected is to be either Commissioner Alexander or Commissioner Drago, the two members of the present board with the least remaining years of service in their

elected term. Their present terms expire after the general election in November, 1980, when their successors have been elected, qualified and taken office according to the laws of Alabama. The Chairman will have all the powers the Chairman would have under the law, rules, and regulations they are governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstension, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners for Districts 3 and 4; there shall be elected in November, 1980, school commissioners for Districts 2 and 5; and there shall be elected in November, 1982, a school commissioner from District 1.[29]

It is further ORDERED, ADJUDGED and DECREED that whenever there shall be a change in any of the five districts heretofore established, evidenced by a federal census of population published following a federal census hereafter taken, there shall be a reapportionment of the school commissioner districts in the manner hereinafter provided.

(1) The school commissioners shall within six months after the publication of each decennial federal census of population for the county, commencing with the 1990 census, file with this court a report containing a recommended plan for the reapportionment of the school commissioner boundaries to comply with the following specifications:

> (a) Each district shall be formed of contiguous and to the extent reasonably possible, compact territory, and its boundary lines shall follow State Senate and House district lines, ward or precinct lines, to the maximum extent possible and other boundary lines shall be the center lines of streets or other well defined boundaries.
>
> (b) Each district shall contain as nearly as is reasonable, the same population.

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[29] All the Districts to be as described in Appendix B.

(2) The report shall include a map and description of the districts.

(3) The provisions of the 1965 Voting Rights Act shall be complied with.

(4) The school commissioners shall comply with any other United States Congressional legislation relating to this subject matter and in compliance with the United States constitutional law.

(5) Upon compliance the above provisions, the redistricting should become effective.

(6) Such redistricting shall not apply to any regular or special election held within six months after its becoming effective. No incumbent member of the Board shall be deprived of his unexpired term of office because of such redistricting.

It is further ORDERED, ADJUDGED and DECREED that the defendants, John L. Moore, individually and in his official capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually and in their official capacites as School Commissioners of Mobile County, Alabama; the Board of School Commissioners of Mobile County, Alabama, and Mobile County, Alabama, their agents, servants, employees, and successors, are hereby ENJOINED from failing to:

(1) Redistrict as set out above.

(2) Make and hold the elections as redistricted.

The defendant Board of School Commissioners and Mobile County are taxed with the costs, including attorneys' fees.

Within 30 days from this date, the attorneys for the plaintiffs are to file affidavits setting forth their claim for attorneys' fees, including hours worked and hourly charges.

The defendants, School Board Commissioners and Mobile County, are to be sent a copy of this claim and these defendants may object in writing within 15 days.

This court retains jurisdiction for the implementation of this order.

Done, this the 9th day of December, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
9TH DAY OF DECEMBER 1976
WILLIAM J. O'CONNOR, CLERK

[Caption Omitted in Printing]

"APPENDIX A"
ORDER ON DEFENDANT BOARD OF SCHOOL COMMISSIONERS' MOTION TO SEVER AND DISMISS OR CONTINUE

The defendant's motion to sever is hereby DENIED. The defendant's motion to dismiss is hereby DENIED.

The defendant's motion to continue in order to give the legislature of the State of Alabama an opportunity to act on a proposed redistricting is hereby DENIED.

The complaint was filed June 9, 1975. The defendant's attention is directed to a conference with the attorneys for the Board of School Commissioners, the County Commissioners, and the City Commission of the City of Mobile, in open court on July 14, 1976. The long delay of the defendant in answering the complaint making the School Board, et al., defendants a second time, was called to the attention of the attorney for the defendant School Board.

It was at the request of the defendant School Board that a continuance was granted of the trial of their case at that time, although there were mitigating court scheduling problems.

It was common knowledge at that time that a proposed redistricting plan had been passed at a previous session of the Legislature but later declared unconstitutional. It was common knowledge there was pending in the State Legislature which was then in session a redistricting plan. The court specifically advised counsel for all the parties that the court would not be disposed to further delay the trial or decision after the September, 1976, setting, and if any, or all of the defendants, anticipated seeking changes in the makeup or districting of their respective Commissions or Boards, they should take action while the Legislature was then in session. Due to the age of this case, and the Legislature having had two opportunities to act during its pendency, additional delays are not justified.

Done, this the 7th day of September, 1976.

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
7TH DAY OF SEPTEMBER 1976
WILLIAM J. O'CONNOR, CLERK

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

"APPENDIX B"

Analysis of Plaintiffs' Plan for School Board

District	Ward/Precinct	Population	% Black VAP	Weighted Black Pop.
1	100-4	7,760	.006	46
	101-1	7,310	.007	51
	North	37,665		7,514
	West	12,851		1,538
		65,585		9,149
				13.9%
2	104-5	4,767	.02	95
	South	34,924		5,148
	100-1	3,122	.05	156
	100-2	2,078	.08	166
	100-3	7,007	.22	1,542
	101-3	5,520	.004	22
	101-2	4,196	.026	109
		61,614		7,238
				11.7%
3	Prichard	41,578		21,005
	98-1	9,438	.666	6,286
	99-1	12,700	.91	11,565
		63,725		38,856
				61.0%
4	99-2	8,664	.954	8,265
	99-3	4,510	.906	4,086
	99-4	5,536	.997	5,519
	103-1	8,946	.995	8,901
	103-2	4,672	.465	2,172
	103-3	8,903	.636	5,662
	102-2	4,896	.03	147
	102-3	4,244	.01	42
	103-4	11,412	.026	297
		61,790		35,091
				56.8%
5	102-4	2,704	.003	8
	102-6	5,280	.043	227
	102-7	3,872	.785	3,040
	102-1	4,793	.22	1,054
	102-5	6,914	.000	0
	101-4	5,888	.074	432
	104-1	8,091	.117	947
	104-2	3,514	.07	246
	104-3	8,410	.067	563
	104-4	6,029	.008	48
	101-5	5,664	.074	419
	101-6	3,489	.074	258
		64,598		7,242
				11.2%

Sources: figures compiled by Tony Parker for regression analysis

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,
Plaintiffs,

v.

CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, etc., et al.,
Defendants.

ORDER AND DECREE AMENDING ORDER AND DECREE DATED DECEMBER 9, 1976

The opinion and order signed by this court December 9, 1976, is AMENDED as follows:

The style of the case is AMENDED to read as follows:

"LEILA G. BROWN, MARY LOUISE GRIFFIN, COOLEY, JOANNIE ALLEN DUMAS, ELMER JOE DAILY EDWARDS, ROSIE LEE HARRIS, HAZEL C. HILL, JEFF KIMBLE, FRANCES J. KNIGHT, JOHN W. LEGGETT, JANICE M. McAUTHOR,

Plaintiffs,

v.

CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, individually and in his official capacity as Probate Judge of Mobile County; JOHN E. MANDEVILLE, individually and in his official capacity as Court Clerk of Mobile County, THOMAS J. PURVIS, individually and in his official capacity as Sheriff of Mobile County; HOWARD E. YEAGER, COY SMITH, G. BAY HAAS, individually and in their official capacity as Mobile County Commissioners; MOBILE COUNTY; THE BOARD OF SCHOOL COMMISSIONERS, ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, individually and in their official capacity as School Commissioners of Mobile County, Alabama,

Defendants."

On page 3, the first paragraph is AMENDED to read as follows:

"This court has jurisdiction over the claims grounded on 42 U.S.C. Sec. 1983 against the Board members and over the claims grounded on 42 U.S.C. Sec. 1973 against all defendants and under 28 U.S.C. Secs. 1343(3)-(4) and 2201."

On page 3, that portion of the fourth paragraph ". . . the Sheriff, and Mobile County." is AMENDED to read "the Sheriff and the Board of School Commissioners of Mobile County."

On page 44, the second and third sentence in the first pararaph is AMENDED to read as follows:

"The Commissioner for District 5 will be elected in November, 1980. The Commissioners for Districts 1 and 2 will be elected in November, 1982."

On page 44, in the third paragraph, the portion of the second sentence, which reads as follows:

". . . and the staggered office terms and election, are to remain. . . ." is AMENDED to read as follows:

". . . and the staggered office terms and election, except as modified herein, are to remain. . . ."

Page 47 is AMENDED to read as follows:

"Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election prior to November, 1980, but will be occupied by either Commissioner Alexander or Drago until the expiration of the period of the present term they are now serving.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve to the end of the term in 1980 for which that person has been elected. The Chairman to be elected is to be either Commissioner Alexander or Commissioner Drago, the two members of the present Board with the least remaining years of service in their elected term. Their present terms expire after the general election in November, 1980.

Since Commissioner Drago's term expires at that time and her place would ordinarily be up for election in the general election of November, 1980, her successor will be elected from District 5 in the general election of 1980. Commissioner Drago will serve to the end of the term for which she has been elected and until her successor has been elected, qualified, and taken office according to the laws of Alabama. Since Commissioner Alexander resides in District 2, and Commissioners Bosarge and Berger live in District 2, no vacancy will exist in that district in 1980. Commissioner Alexander will serve until the end of the term in 1980 to which he was elected in 1974.

The Chairman elected under this order will have all the powers the Chairman would have under the law, rules, and

regulations the Chairman is now governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstension, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners from District 3 and 4; there shall be elected in November, 1980."

On page 48, the first three lines are to be AMENDED to read as follows:

"a school commissioner for District 5; and there shall be elected in November, 1982, school commissioners from District 1 and 2.[29]"

Done, this the 13th day of December, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
13TH DAY OF DECEMBER 1976
MINUTE ENTRY NO. 42431
WILLIAM J. O'CONNOR, CLERK
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, MARY LOUISE GRIFFIN, COOLEY, JOANNIE ALLEN DUMAS, ELMER JOE DAILY EDWARDS, ROSIE LEE HARRIS, HAZEL C. HILL, JEFF KIMBLE, FRANCES J. KNIGHT, JOHN W. LEGGETT, JANICE M. McAUTHOR,

Plaintiffs,

v. CIVIL ACTION No. 75-298-P

JOHN L. MOORE, individually and in his official capacity as Probate Judge of Mobile County; JOHN E. MANDEVILLE, individually and in his official capacity as Court Clerk of Mobile County, THOMAS J. PURVIS, individually and in his official capacity as Sheriff of Mobile County; HOWARD E. YEAGER, COY SMITH, G. BAY HAAS, individually and in their official capacity as Mobile County Commissioners; ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, individually and in their official capacity as School Commissioners of Mobile County, Alabama,

Defendants.

JUDGMENT

This court has heretofore entered its findings of fact and conclusions of law in favor of the plaintiffs and against the defendants, John L. Moore, individually and in his official

capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his official capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County; Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually and in their official capacity as School Commissioners of Mobile County, Alabama, and Mobile County, Alabama.

The court has found that the electoral structure, the multi-member at-large election of the School Commissioners of Mobile County, results in an unconstitutional dilution of the black plaintiffs' voting strength. It is fundamentally unfair and invidiously discriminatory.

In the plan adopted and approved by the court and attached to the court's Opinion and Order as "Appendix B" thereof, the Commissioners for Districts 3 and 4 will be elected in 1978. A commissioner for District 5 will be elected in November, 1980. The commissioners for Districts 1 and 2 will be elected in November, 1982. The commissioners will take office on the date as provided by the laws of the State of Alabama.

As the single-member districts are elected in the future, each school commissioner shall have been a resident of the district which that person represents for not less than 12 months immediately preceding that person's election and shall reside in the district during that person's term of office. All other qualifying and eligibility requirements should be that as provided by the laws of the State of Alabama. All other laws of the State of Alabama as apply to the Mobile County School System not in conflict with this order shall govern.

The number of the members of the Board, the length of the term of office, and the staggered office terms and election, are to remain as provided by the legislature.

Under the ordered single-member district plan which requires residence in the district which the commissioner represents, the present Board members now reside in the districts as follows:

Commissioners Bosarge, Alexander, and Berger in District 2.

Commissioner Sessions in District 4.

Commissioner Drago in District 5.

No one resides in District 3 which has a majority black population and is entitled to a commissioner in 1978. Commissioner Sessions resides in District 4 which has a majority black population and is entitled to a place in 1978. Commissioner Sessions' term expires in 1978 and there will automatically be a vacancy for that district at that time.

In order for District 3 to have a place, one other Board member's term must be shortened or modified. Proceeding on the premises stated of shortening or modifying members' terms who had the least remaining time of service, the choice narrows to Commissioners Alexander and Drago.

Should one of the places held by a commissioner other than Commissioner Sessions, whose place will not be open for election in 1978, become vacant prior to the time required by the laws of the State of Alabama for qualifying for the November, 1978, election, that place will not be filled by election prior to November, 1980, but will be occupied by either Commissioner Alexander or Drago until the expiration of the period of the present term they are now serving.

In the event there is not a vacancy in one of the present places as above set out, the Board, by a majority vote on or before one month prior to the general election in 1978, shall elect a Chairman or President (Chairman) of the Board, and immediately report the results of the election to this court, to serve to the end of the term in 1980 for which that person has been elected. The Chairman to be elected is to be either

Commissioner Alexander or Commissioner Drago, the two members of the present Board with the least remaining years of service in their elected term. Their present terms expire after the general election in November, 1980.

Since Commissioner Drago's term expires at that time and her place would ordinarily be up for election in the general election of November, 1980, her successor will be elected from District 5 in the general election of 1980. Commissioner Drago will serve to the end of the term for which she has been elected and until her successor has been elected, qualified, and taken office according to the laws of Alabama. Since Commissioner Alexander resides in District 2, and Commissioners Bosarge and Berger live in District 2, no vacancy will exist in that district in 1980. Commissioner Alexander will serve until the end of the term in 1980 to which he was elected in 1974.

The Chairman elected under this order will have all the powers the Chairman would have under the law, rules, and regulations the Chairman is now governed by except the right to vote. For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstention, absence, or any other reason. After the 1980 election, the Board will have only five members and this provision with reference to the Chairman will no longer apply.

It is therefore ORDERED, ADJUDGED, and DECREED that there shall be elected in November, 1978, school commissioners from District 3 and 4; there shall be elected in November, 1980, a school commissioner for District 5; and there shall be elected in November, 1982, a school commissioner from District 1 and a school commissioner from District 2.[1]

It is further ORDERED, ADJUDGED and DECREED that whenever there shall be a change in any of the five districts

[1] All the Districts to be as described in Appendix B to the Opinion and Order.

heretofore established, evidenced by a federal census of population published following a federal census hereafter taken, there shall be a reapportionment of the school commissioner districts in the manner hereinafter provided.

(1) The school commissioners shall within six months after the publication of each decennial federal census of population for the county, commencing with the 1990 census, file with this court a report containing a recommended plan for the reapportionment of the school commissioner boundaries to comply with the following specifications:

(a) Each district shall be formed of contiguous and to the extent reasonably possible, compact territory, and its boundary lines shall follow State Senate and House district lines, ward or precinct lines, to the maximum extent possible and other boundary lines shall be the center lines of streets or other well defined boundaries.

(b) Each district shall contain as nearly as is reasonable, the same population.

(2) The report shall include a map and description of the districts.

(3) The provisions of the 1965 Voting Rights Act shall be complied with.

(4) The school commissioners shall comply with any other United States Congressional legislation relating to this subject matter and in compliance with the United States constitutional law.

(5) Upon compliance with the above provisions, the redistricting should become effective.

(6) Such redistricting shall not apply to any regular or special election held within six months after its becoming effective. No incumbent member of the Board shall be deprived of his unexpired term of office because of such redistricting.

It is further ORDERED, ADJUDGED and DECREED that the defendants, John L. Moore, individually and in his official capacity as Probate Judge of Mobile County; John E. Mandeville, individually and in his capacity as Court Clerk of Mobile County; Thomas J. Purvis, individually and in his official capacity as Sheriff of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually and in their official capacities as School Commissioners of Mobile County, Alabama; the Board of School Commissioners of Mobile County, Alabama, and Mobile County, Alabama, their agents, servants, employees, and successors, are hereby ENJOINED from failing to:

(1) Redistrict as set out above.

(2) Make a hold the elections as redistricted.

The defendant Board of School Commissioners is taxes with the costs, including attorneys' fees.

Within 30 days from this date, the attorneys for the plaintiffs are to file affidavits setting forth their claim for attorneys' fees, including hours worked and hourly charges. The defendant School Board Commissioners are to be sent a copy of this claim and these defendants may object in writing within 15 days.

This court retains jurisdiction for the implementation of this order.

Done, this the 18th day of January, 1977.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
18th DAY OF JANUARY 1977
WILLIAM J. O'CONNOR, CLERK

RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT IN BROWN V. MOORE

ATTORNEYS

Plaintiffs

GREGORY B. STEIN
J.U. BLACKSHER
1407 Davis Avenue
Mobile, Alabama 36603

EDWARD STILL
Suite 601, Title Building
2030 3rd Avenue, North
Birmingham, Alabama 35203

JACK GREENBERG,
JAMES M. NABRIT, III and
CHARLES E. WILLIAMS, III
Suite 2030, 10 Columbus Circle
New York, New York 10019

Defendants

MOORE, MANDEVILLE, PURVIS AND FOR
YEAGER, SMITH AND HAAS

JAMES C. WOOD
Assistant County Attorney
1010 Van Antwerp Building
Mobile, Alabama 36602

RALPH KENNAMER
P.O. Box 624
Mobile, Alabama 36601

SCHOOL COMMISSIONERS, WILLIAMS, ALEXANDER, BERGER, DRAGO & SESSIONS

ABE PHILIPS—WITHDRAWN 12-21
P. O. Box 8158
Mobile, Alabama 36608

Attorneys for Robert Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions, individually & in their official capacity, etc.
Messrs. Robert C. Campbell, III, Daniel A. Pike, and Frank G. Taylor,
The Plaza West Building
800 Downtowner Blvd.
Mobile, Alabama 36609

Date	Proceedings
6/9/75	Complaint filed, lps
7/8/75	Motion to Dismiss, with brief, filed by defendants Moore, Mandeville, Purvis, Yeager, Smith and Haas, with further Motion to Strike, Ajr
7/15/75	Motion to Dismiss, with brief, and Motion to Strike, filed by defendants Williams, Alexander, Berger, Drago and Sessions, Ajr
8/29/75	Motion to Dismiss and Motion to Strike, filed by defendants Moore, et al and Motion to Dismiss and Motion to Strike, filed by defendants Williams, et al, Submitted without argument, Ajr
9/26/75	Status Report. AMENDMENT TO STANDARD PRE-TRIAL ORDER and DISCOVERY EXTENDED TO AND INCLUDING NOV. 10, 1975, and naming of witnesses on or before Nov. 25, 1975. Copy of this Amendment to Standard Pre-Trial Order mailed to the Attorneys of Record on 9-30-75 (W.J.O.)
11/21/75	ORDER entered that cause of action against Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually & in their official capacity as School Commissioners of Mobile County, Alabama, is DISMISSED, without prejudice; M/E No. 39,409-H; copy mailed to attorneys on 11/28/75, wet
11/28/75	Status Report. No Problems. Set this case for Pre-Trial the same date as Civil 75-297, Bolden v. City of Mobile (W.J.O.)
12/15/75	Motion for certification of class filed by plaintiffs; referred to Magistrate; notice mailed attorneys, wet
12/17/75	Appearance of Counsel for plaintiffs filed by Jack Greenberg, James M. Nabrit, III and Charles E. Williams, III Ajr

Date	Proceedings
12/29/75	Order entered that defendants' motion to dismiss under 42 U.S.C. Sec. 1973 is DENIED; defendants' motion to dismiss under 42 U.S.C. Sec. 1985(3) is GRANTED; defendants' motion to dismiss under Sec. 1343(4) DENIED; defendants' motion to strike attorneys' fees and the injunctive relief in Par. V-2 is DENIED, Min. Entry No. 39647; copy mailed to Attorneys, Ajr
1/7/76	Answer to complaint filed by defendants Moore, Mandeville, Purvis, Yeager and Haas, Ajr
1/8/76	Motion to Dismiss Certain plaintiff, Hazel C. Hill, without prejudice, filed by plaintiffs, Ajr
1/13/76	Preliminary pretrial order for pretrial set the 4th day of February, 1976, entered by Judge Pittman, filed copies of order mailed to attorneys on 01-07-76 by Mrs. Madge Andress, grs
1/14/76	Motion to Dismiss Certain plaintiff (Hazel C. Hill), without prejudice, filed by plaintiffs January 8, 1976 GRANTED, notices mailed Ajr
1/19/76	Order entered that plaintiffs may maintain this action as a class action, Minute Entry No. 39,815; copies mailed to attorneys, Ajr
1/29/76	Motion for preliminary injunction filed by plaintiffs, jb
2/2/76	Appearance of Ralph Kennamer as attorney for defendants filed, wet Joint Pretrial Document filed by parties, wet
2/4/76	Motion to add party defendant filed by plaintiffs; referred to Judge Pittman, wet
2/4/76	CASE PRE TRIED ON 4 Feb. 1976 by JUDGE VIRGIL PITTMAN (WJO)
2/5/76	ORDER entered on pretrial hearing, copies mailed to attorneys by Mrs. Madge Andress, grs
2/10/76	WITHDRAWAL of plaintiffs' motion for preliminary injunction filed by plaintiffs Leila G. Brown, et al. mpc

Date	Proceedings
2/10/76	ORDER entered as follows: 1. Plaintiffs' motion to join County of Mobile, Alabama as party defendant is GRANTED as to plaintiffs' claims predicated on 42 USC 1973 and is DENIED as to plaintiffs' claims predicated on 42 USC 1983 and 1985. 2. Clerk is directed to cause service of process on said defendant. Such service shall be accompanied with copies of answer of certain of individual defendants filed on 1/7/76 (File Doc. No. 76), the motion to join Mobile County as a party defendant filed by plaintiffs on 2/4/76 (File Doc. No. 90), and a copy of this order. 3. Clerk is further directed to mail a copy of this order together with other documents described above to Maury Friedlander, Attorney for the County of Mobile. Above entry is in M/E No. 40,012; copy mailed to attorneys on 2/12/76, wet.
2/25/76	Motion to dismiss filed by defendant, brief attached, jb
2/25/76	Specification of racially discriminatory acts filed by plaintiffs
3/1/76	Motion to Add Parties Defendant, filed by the plaintiff, Ajr
3/8/76	Motion to Add Parties Defendant, filed by the defendants March 1, 1976 GRANTED; notices mailed Ajr
3/12/76	Status Report, no problems. Judge Pittman to set date for trial Motion to dismiss, filed by defendant on Feb. 25, 1976 submitted without argument, Ajr
3/19/76	Following documents given to USM for service on each of eleven (11) defendants as set out after list of documents: 1. Clerk's notice of Judge Pittman's decisions granting plaintiffs' motion to add parties defendant - March 8, 1976.

Date	Proceedings
	2. Motion to add parties defendant & attachments filed Mar. 1, 1976.
	3. Pretrial Order, Feb. 4, 1976.
	4. Joint pretrial document, filed on or about January 28, 1976.
	5. Order on motion to dismiss entered December 29, 1975, Minute Entry No. 39647.
	6. Motion to dismiss filed on or about July 8, 1975.
	Defendants to be served with above described documents are:
	BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY,
	ROBERT R. WILLIAMS, Individually,
	ROBERT R. WILLIAMS, Official capacity,
	DAN C. ALEXANDER, JR., Individually,
	DAN C. ALEXANDER, JR., Official capacity,
	NORMAN J. BERGER, Individually,
	NORMAN J. BERGER, Official capacity,
	RUTH F. DRAGO, Individually,
	RUTH F. DRAGO, Official capacity,
	HOMER L. SESSIONS, Individually,
	HOMER L. SESSIONS, Official capacity, wet
3/23/76	Return of USM filed showing service of those documents as listed in entry of 3/19/76 above on all defendants, lps
3/30/76	Motion to Dismiss, filed by the defendant Mobile County on Feb. 25, 1976 and submitted March 12, 1976, DENIED; notices mailed Ajr
6/22/76	Qualifications of expert witness filed by defendants, with attachment
6/28/76	Witness list of defendants, John L. Moore, John E. Mandeville, Thomas J. Purvis, Howard E. Yeager and G. Bay Haas, filed, grs

Date	Proceedings
6/29/76	Plaintiffs' witness list filed, wet
	Objections to qualifications of defendants' expert witness, filed by plaintiffs, wet
7/6/76	Motion for continuance filed by defendants, Mobile County School Commissioners, Ajr
7/8/76	Motion for continuance, filed by defendants, Mobile County School Commissioners DENIED, notices mailed Ajr
7/9/76	Supplemental witness list filed by defendants, jrb
7/12/76	Motion for Default Judgment, filed by plaintiffs,
	Affidavit for entry of default by clerk, filed by plaintiffs, Ajr
7/12/76	Second motion for continuance filed by defendants, Mobile County School Commissioners, Taken to Judge Pittman by Mr. Philips, jb
7/12/76	ANSWER to Amended Complaint filed by Defendants, the Board of School Commissioners of Mobile County and Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, grs
7/13/76	Response to Motion for Default Judgment, filed by defendant, Board of School Commissioners of Mobile County, Ala., Ajr (DENIED orally)
7/14/76	Supplemental witness list filed by defendants MOORE, MANDEVILLE, PURVIS, YEAGER and HAAS, jb
7/15/76	Amendment to Standard Pretrial Order and DISCOVERY EXTENDED TO AND INCLUDING July 26, 1976, AND NAMING OF WITNESSES ON OR BEFORE July 30, 1976. Copy of this Amendment mailed on 15 July 1976 to Messrs. Blacksher, Still, Greenberg, Wood, Kennamer, and Philips (W.J.O.)
7/20/76	Preliminary pretrial order for pretrial set the 2nd day of AUGUST, 1976, entered by Judge Pittman filed, copies of order mailed to attorneys on 7/15/76 by Mrs. Madge Andress, grs

Date	Proceedings
7/30/76	Supplemental joint pretrial document relevant to MOBILE COUNTY SCHOOL BOARD, filed by the parties, grs
7/30/76	List of witnesses filed by defendant, Ajr
8/2/76	CASE PRE TRIED ON 2 AUGUST 1976 BY JUDGE VIRGIL PITTMAN (WJO)
8/9/76	ORDER entered on pretrial hearing, copies mailed to attorneys by Mrs. Madge Andress, grs
8/26/76	First Response to order on pre-trial hearing filed by defendant BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, wet
9/2/76	Motion to Sever and to Dismiss or Continue filed by defendant Board of School Commissioners of Mobile County mpc
9/2/76	Response to Order on Pretrial Hearing filed by defendant Board of School Commissioners relating to submission to the Court of proposed reapportionment plan
9/2/76	DEFENDANTS' PROPOSED PLAN for Commission Districts filed, with Map attached, mpc (in separate red folder, with other plans)
9/3/76	PLAINTIFFS' PROPOSED REAPPORTIONMENT PLANS for Mobile County filed with two maps as Exhibits (placed in red folder with other Plans) mpc
9/3/76	Motion to Strike and to exclude testimony and exhibits, filed by Plaintiffs, in reference to defendants' First Response to Order on Pretrial Hearing, mpc
9/7/76	ORDER entered on motions of Board of School Commissioners, filed September 2, 1976, *DENYING* defendant's motion to sever; *DENYING* defendant's motion to dismiss; and *DENYING* said defendant's motion to continue in order to give the Legislature of the State of Alabama an opportunity to act on a proposed redistricting; (Minute Entry No. 41649). Attorneys Blacksher, Menefee,

Date	Proceedings
	Kennamer, and Abe Philips notified by telephone; copies of order mailed to all attorneys of record on 9/7/76 mpc
9/9/76	Response to Plaintiff's Motion to Strike & to exclude testimony
9/9/76	MOTION TO RECONSIDER the Court's Order of Sept. 7, 1976 denying motion of defendant Board of School Commissioners to Sever, denying motion of defendant Board of School Commissioners to Dismiss, and denying motion of defendant Board of School Commissioners to Continue trial of case, filed in open Court, and *DENIED* by the Court.
9/9/76	MOTION TO STAY pending Certification for Interlocutory Appeal and Pending Interlocutory Appeal, filed by defendants Board of School Commissioners, in open Court, and *DENIED* by the Court.
9/9/76	Motion to Stay pending Appeal, filed by defendants Board of School Commissioners, in open Court, and *DENIED* by the Court.
9/9/76	Motion to Certify for immediate Interlocutory Appeal the prior Order of this Court entered on Sept. 7, 1976, denying defendant Board of School Commissioners' Motion to Dismiss, denying the Defendants' Motion to Sever and denying the Defendants' Motion for a Continuance, filed in open Court by Defendants, the Board of School Commissioners, and its members, and *DENIED* by the Court.
9/9/76	NOTICE OF APPEAL filed in open Court by the Defendants, the Board of School Commissioners of Mobile County, and its members, individually and in their official capacities as the School Commissioners of Mobile County, from the Order of the Court entered on Sept. 7, 1976 denying Defendants' Motion to Sever, denying the Defendants' Motion to Dismiss and denying the Defendants' Motion to Continue.

Date	Proceedings
	(Each of the Court's rulings denying the above five(5) motions was announced to attorneys for the parties in open Court.)
	Trial by Court begun, witnesses sworn and examined on behalf of plaintiff, exhibits offered in evidence, trial RECESSED until Friday, September 10, 1976. (Minute Entry No. 41,663-A). mpc
	Trial by Court resumed, witnesses further examined on behalf of plaintiff, exhibits offered in evidence, trial RECESSED until Monday, September 13, 1976. (Minute Entry No. 41,668.) mpc
9/9/76	PROPOSED PLANS OF DEFENDANT BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY filed, mpc (in red folder with other Plans). mpc
9/13/76	Trial by Court resumed. Witnesses further examined by Plaintiffs; exhibits offered in evidence; trial RECESSED until Tuesday, Sept. 14, at 9:00 A.M. (Minute Entry No. 41,684A).
9/13/76	Withdrawal of Notice of Appeal from order entered on 9/7/76 denying defendants' motion to sever, denying defendants' motion to dismiss and denying defendants' motion to continue filed by defendants BOARD OF SCHOOL COMMISSIONERS, ET AL; copies mailed to attorneys and to Clerk, CCA by letter of transmittal, lps
9/14/76	TRIAL OF CAUSE BY COURT RESUMED. Witnesses further examined on behalf of Plaintiffs, exhibits offered, and trial RECESSED until Wednesday, September 15, 1976 at 9:00 A.M. (Minute Entry No. 41,691-C). mpc
9/15/76	Continuation of Deposition of DOCTOR CHARLES L. COTRELL filed
	TRIAL OF CAUSE BY COURT RESUMED. Witnesses further examined on behalf of plaintiffs, exhibits offered, and at 11:40 A.M., plaintiffs

Date	Proceedings
	conditionally rest their case. One witness examined on behalf of defendants, exhibits offered in evidence and trial of case RECESSED until Sept. 16, 1976, at 9:00 o'clock A.M. (Minute Entry No. 41712) mpc
9/16/76	TRIAL OF CAUSE BY COURT RESUMED. Witnesses further examined and exhibits offered on behalf of defendants Moore, etc. and said defendants conditionally rest. Witnesses examined on behalf of defendant School Board, and trial RECESSED to Friday, Sept. 17, 1976 at 9:00 A.M. (Minute Entry No. 41,728-B) mpc
9/17/76	TRIAL BY COURT RESUMED. Witnesses further examined on behalf of defendant Board of School Commissioners. At 3:15 P.M. all parties rest. Post trial arguments of counsel are heard, and trial RECESSED to a later date for arguments on the Plans submitted by the parties. (Minute Entry No. 41,737-C) mpc
9/21/76	SUBMISSION OF POST-TRIAL EVIDENCE filed by defendants, from the Mobile County Engineer, in letter form, pursuant to instruction from trial judge mpc
9/30/76	Plaintiffs' response to defendants' submission of post-trial evidence filed, grs
10/12/76	Statistical Data filed by defendants, wet
10/14/76	Submission of population estimates for plans of all parties filed by plaintiffs, wet
	Motion for alternative relief, with brief attached, filed by plaintiffs, wet
10/20/76	Brief re. Gerrymandering filed by defendants, mpc
10/21/76	Document entitled "AS TO COURT SUGGESTED PLAN FOR SINGLE MEMBER DISTRICTS" filed by Defendants, mpc
12/9/76	Opinion and order entered as to defendants BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, ETC.:

Date	Proceedings
	1. That there shall be elected in Nov. 1978 school commissioners for Districts 3 & 4; there shall be elected in Nov. 1980 school commissioners for Districts 2 & 5; and there shall be elected in Nov. 1982 a school commissioner from District 1.
	2. That whenever there shall be a change in any of the 5 districts heretofore established, evidenced by a federal census published following a federal census hereafter taken, there shall be a reapportionment of the districts in the manner as more fully set out in order.
	3. Further ordered that defendants as more fully set out in order are ENJOINED from failing to: (1) Redistrict as set out in order. (2) Make & hold the elections as redistricted.
	Defendant BOARD OF SCHOOL COMMISSIONERS AND MOBILE COUNTY are taxed with costs, including attorneys' fees.
	Within 30 days from this date, attorneys for plaintiffs are to file affidavits setting forth their claim for attorneys' fees. Defendants School Board and Mobile County are to be sent copy of claim and defendants may object in writing within 15 days. Court retains jurisdiction; M/E No. 42,403; copy given to attorneys Larry Menefee, Abe Philips & Ralph Kennamer (copy also given attorney George Stone & The School Board); copy mailed attorneys Edward Still & Jack Greenberg; wet
12/10/76	Plaintiffs' re-analysis of plans for School Board and County Commission filed, wet
12/13/76	ORDER and decree amending order and decree dated 12/9/76 as more set out in order; M/E No. 42,431; copy mailed ALL attorneys on 12/14/76, wet
12/17/76	Plaintiffs' Motion for Award of Costs and Attorneys' fees, filed Ajr

Date	Proceedings
12/21/76	Motion for Re-Hearing of cause, filed by ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, ind. and in capacity as School Commissioners of Mobile County, Ala. Ajr (referred to Judge Pittman) ORAL ARGUMENT REQUESTED
	Withdrawal as Counsel of Record, filed by Abe Philips, Ajr
	Notice of Appearance of Counsel for defendants WILLIAMS, ALEXANDER, BERGER, DRAGO and SESSIONS filed by Daniel A. Pike for the firm of Sintz, Pike, Campbell & Duke Ajr
12/27/76	Motion to Strike, filed by the defendant Mobile County, Ajr (referred to Judge Pittman)
12/27/76	ORDER entered that attorneys for plaintiffs & for COUNTY COMMISSIONER are requested to submit additional proposed plans for districting of county. Plans are to be submitted on or before 1/3/77; M/E No. 42,528; attorneys advised by phone of order; on 12/29/76 copy of order mailed attorneys for plaintiffs and attorneys for defendants COUNTY COMMISSIONERS, wet
12/27/76	Order entered extending time from January 3, 1977 to January 6, 1977 within which to file plans, See M/E 42,534-B copies mailed attys
12/30/76	Motion for Re-Hearing filed by defendants SCHOOL BOARD COMMISSIONERS on 12/21/76 is argued & TAKEN UNDER SUBMISSION; wet
12/30/76	Order setting aside submission as to the matter of districting plans, See M/E 42,573, (je)
1/4/77	Motion for Re-Hearing filed by ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, indiv. & in their official capacity as School Commissioners of Mobile County, Alabama, on 12/21/76 is DENIED; notice of ruling mailed attorneys, wet

Date	Proceedings
1/5/77	Joint Proposal of Plan for the Mobile County Commission filed; wet
1/18/77	ORDER of judgment entered in favor of plaintiffs and against defendants as is more fully set out in order. Defendant BOARD OF SCHOOL COMMISSIONERS is taxed with costs, including attorneys' fees. Attorneys for plaintiffs to submit affidavits within 30 days. Def. SCHOOL BOARD COMMISSIONERS to be sent copy of pltffs. claim & def. may object in writing within 15 days. Court retains jurisdiction for implementation of this order; M/E No. 42,710; wet
1/20/77	Motion filed 20 Jan. 1977 by the Defendants, Robert R. Williams, Dan C. Alexander, Jr., et al., for Protective Order, with Certificate of Service. (Memo: Copy of this Motion forwarded on 20 Jan. 1977 to Judge Pittman for his action). W.J.O.
1/21/77	Plaintiffs' Response to defendant School Commissioners' Motion for Protective Order filed, Ajr
	Order entered that the plaintiffs will be required to pay reasonable expenses for travel, etc. in taking depositions in Birmingham, Alabama. Minute Entry No. 42,755 Ajr
	Order entered granting the immediate right to either party to take an immediate appeal; that this decree is a final judgment as to defendants, School Commissioners and the time limit under Rule 4(a) FRAP shall apply as of the date of this order, Minute Entry No. 42,754 Ajr

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUN. 9, 1975
WILLIAM J. O'CONNOR, CLERK

COMPLAINT

I.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1330 and 1343. The amount in controversy exceeds $10,000.00 exclusive of interest and costs. This is a suit in equity arising out of the Constitution of the United States, the First, Thirteenth, Fourteenth and Fifteenth Amendments, and 42 U.S.C. Secs. 1973, 1983 and 1985 (3).

II.

Class Action

Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23 (a) and 23 (b)(2), Federal Rules of Civil Procedure. The class which plaintiffs represent is composed of all black citizens of Mobile County, Alabama. All such persons have been, are being, and will be adversely affected by the defendants' practices complained of herein. There are common questions of law and fact affecting the rights of the members of this class, who are, and continue to be, deprived of the equal protection of the laws because of the election system detailed below. These persons are so numerous that joinder of all members is impracticable. There are questions of law and fact common to plaintiffs and the class they represent. The interests of said class are fairly and adequately represented by the named plaintiffs. The defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

III.

Plaintiffs

A. Plaintiff *Leila G. Brown* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Theodore.

B. Plaintiff *Mary Louise Griffin Cooley* is a black citizen of Mobile County, Alabama, over the age of 21 years.

C. Plaintiff *Joannie Allen Dumas* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Mount Vernon, Alabama.

D. Plaintiff *Elmer Joe Daily Edwards* is a black citizen of Mobile County, Alabama, over the age of 21 years.

E. Plaintiff *Rosie Lee Harris* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Saraland, Alabama.

F. Plaintiff *Hazel C. Hill* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Mobile, Alabama.

G. Plaintiff *Jeff Kimble,* is a black citizen of Mobile County, Alabama, over the age of 21 years.

H. Plaintiff *Frances J. Knight* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Theodore, Alabama.

I. Plaintiff *John W. Leggett* is a black citizen of Mobile County, Alabama, over the age of 21 years.

J. Plaintiff *Janice M. McAuthor* is a black citizen of Mobile County, Alabama, over the age of 21 years, residing in the City of Saraland, Alabama.

IV.

Defendants

A. Defendant JOHN L. MOORE is the Probate Judge of Mobile County. Defendant JOHN E. MANDEVILLE is the Circuit Clerk of Mobile County. Defendant THOMAS J. PURVIS is the Sheriff of Mobile County. These three officers, or persons appointed in their stead by the Register in Equity serve as the appointing Board for election officials (Title 17, Sections 120-26, *Code of Alabama* (1958)) and as the Board of Election Supervisors to certify election results (*id.*, Sections 139, 139(1), 199, 209, 344).

B. Defendants HOWARD E. YAEGER, COY SMITH AND G. BAY HAAS are members of the Mobile County Commission.

C. Defendants ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, AND HOMER L. SESSIONS are members of the Board of School Commissioners of Mobile County.

V.

Nature of Claim

A. The Mobile County Commission is the general supervisory agency of government for Mobile County. It holds the legislative power granted to counties and performs certain executive functions as well.

B. The County Commission consists of three (3) members, who run for numbered places and are elected at large. The only restriction, other than age, is that commissioner number one must be a resident of the City of Mobile and commissioner number two must be a non-resident. Act 181, 1957 Reg. Sess. All members are elected at the same time.

C. The Board of School Commissioners of Mobile County is composed of five members who are elected at large to six year terms. Two members were elected in 1970, three in 1972, two in 1974.

D. The City of Mobile has a population of 190,026, or about 60% of the County population (317,308). 1970 Census of Population, Vol. 1, Part 2, Table 10.

E. Mobile County has a black population of 102,383, or approximately 32% of the total. Of this total, 88% (88,361) live in the cities of Mobile and Prichard, which have only 73% of the total population of the county.

The Black population for each city is as follows:

	# of black	% black
Mobile	67,356	35.4
Prichard	21,005	50.5

F. According to the 1970 Census, 257,816 people (or 81% of the total population) live in the urbanized area in and around Mobile. 1970 Census of Population, Vol. 1, Part 2, Table 12.

G. The present system of electing members of the Mobile County Commission discriminates against black residents of Mobile and Prichard in that their concentrated strength is diluted and minimized by the larger white majority in other parts of the county.

H. The present system of electing members of the Board of School Commissioners of Mobile County discriminates against black residents of Mobile and Prichard in that their concentrated strength is diluted and minimized by the larger white majority in other parts of the county.

I. The present system of electing members of the Board of School Commissioners of Mobile County discriminates against the rural interests in the county by submerging their local strength in the county-wide urban majority.

VI.

Plaintiffs in the class they represent have no plain, adequate or complete remedy at law to redress the wrongs alleged herein, and this suit for a permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from the unconstitutional election system described herein.

WHEREFORE, plaintiffs respectfully pray this Court to advance this case on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Grant plaintiffs and the class they represent a declaratory judgment that the election system complained of herein violate the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1973, 1983 and 1985 (3).

2. Grant plaintiffs and the class they represent an order enjoining the defendants, their agents, successors, attorneys and those acting in concert with them and at their direction from holding, supervising, or certifying the results of any election for the County Commission or the Board of School Commissioners of Mobile County under the present election system.

3. Order the reapportionment of the County Commission and Board of School Commissioners of Mobile County so that the voting strength of black citizens is not diluted, minimized or canceled out.

4. Award plaintiffs and the class they represent their costs in this action including an award of reasonable attorneys' fees.

5. Grant such other and further equitable relief as the Court may deem just and proper.

CRAWFORD, BLACKSHER & KENNEDY
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

By: _____
J. U. BLACKSHER

EDWARD STILL, ESQ.
321 FRANK NELSON BUILDING
BIRMINGHAM, ALABAMA 35203

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,
Plaintiffs,

v. CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, et al.,
Defendants.

ORDER

The plaintiffs have advised the court that the Legislature has enacted a new system of electing members of the Board of School Commissioners of Mobile County, and the defendants, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, who have been made defendants individually and in their official capacity as School Commissioners of Mobile County, Alabama, should be dismissed as defendants and the cause of action against them dismissed on the plaintiffs' motion, without prejudice.

It is therefore ORDERED, ADJUDGED and DECREED that said defendants, and the cause of action against them as set out in the complaint, are hereby DISMISSED, without prejudice.

Done, this the 21st day of November, 1975.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
21st DAY OF NOVEMBER 1975
WILLIAM J. O'CONNOR, CLERK

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
DEC. 15, 1975
WILLIAM J. O'CONNOR, CLERK

PLAINTIFFS' MOTION FOR CERTIFICATION OF CLASS

Come now the Plaintiffs and move the Court to certify them as representatives of the class of black citizens of Mobile County, Alabama. There is now adequate evidence shown by the pleadings and discovery that:

1. The class is so numerous that joinder of all members of the class is impractical.

2. There are questions of fact and law common to all members of the class.

3. The named Plaintiffs are typical of the class insofar as their claims in this action and would fairly and adequately represent the interests of the class.

4. The actions of the Defendants in perpetuating the governmental structure of representation attacked in this action are generally applicable to all members of the class, thereby making appropriate final injunctive and declaratory relief.

Submitted by:

Edward Still
601 Title Building
Birmingham, Alabama 35203
205/323-6171

James H. Blacksher
Gregory B. Stein
1407 Davis Avenue
Mobile, Alabama 36603

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,
Plaintiffs,

v. CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, et al.,
Defendants.

ORDER ON MOTION TO DISMISS

The plaintiffs, black citizens of the County of Mobile, seek to bring this action as a class action on behalf of themselves and on behalf of all other black persons similarly situated, pursuant to Rule 23(a) and Rule 23(b)(2), Federal Rules of Civil Procedure.

It is alleged that they, and all other such persons, have been, are being, and will be adversely affected by the defendants' practices complained of, to wit, they are and continue to be deprived of equal protection of the laws because of the election at large system of the County Commissioners to numbered places. It is claimed this discriminates against black residents of Mobile and Prichard in that their concentrated voting strength is "diluted and cancelled out by the white majority."

The plaintiffs seek the following relief: (1) a declaratory judgment that the election system violates the First, Thirteenth, Fourteenth, and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1973, 1983, and 1985(3); (2) issue an order enjoining the defendants, their agents, etc. from holding, supervising, or certifying the results of any election for the County Commission of Mobile County under the present at-large election system; (3) order the reapportionment of the County Commission of Mobile County so that the voting strength of black citizens is not diluted, minimized, or cancelled out; (4) award the plaintiffs costs and a reasonable attorney's fee; (5) grant such other and further equitable relief as the court may deem just and proper.

Jurisdiction is invoked pursuant to 28 U.S.C. § § 1331 and 1343.

The motion to dismiss the cause of action stated under 42 U.S.C. § 1985(3) is due to be granted.

In *Westberry* v. *Gilman Paper Co.*, 507 F.2d 206, 214 (1975), the Fifth Circuit summarized a 1985(3) cause of action as follows:

> "This requires that the complaint show that there was a conspiracy; that such a conspiracy be for the purpose of depriving an individual of the equal protection of the laws; that the co-conspirators acted in furtherance of their conspiracy, and that the plaintiff was injured in his person or property or actually deprived of a citizen's right or privilege. Second, as the Supreme Court noted in Griffin: [T]he language of [of 1985(3)] requiring intent to deprive of equal protection or equal privileges, and immunities means that there must be some racial or perhaps otherwise class based invidiously discriminatory animus behind the conspirators' action."[1]

Plaintiffs have not set out sufficient allegations of a conspiracy to meet this test. They only allege that the election system discriminates against them. [Complaint IV-E]. Therefore, insofar as the action is based on 42 U.S.C. § 1985(3), the complaint fails to state a cause of action and the motion to dismiss this cause of action as to all defendants in the complaint is well taken and is GRANTED.

The defendants' motion to dismiss the cause of action under the Voting Rights Act of 1965, 42 U.S.C. § 1973 is not well taken and the motion is DENIED as to all defendants.[2]

---

[1] See *Griffin* v. *Breckenridge*, 403 U.S. 88.

[2] See the amendment to the Act approved August 6, 1975: "Section 401. Section 3 of the Voting Rights Act of 1965 is amended by striking out 'Attorney General' the first three times it appears and inserting in lieu thereof the following 'Attorney General or, an aggrieved person." U.S. Code Congressional and Administrative News, P.L. 94-73, 89 Stat. 404.

Therefore, under 28 U.S.C. § 1343(4), this court has jurisdiction of all defendants.

Since this court has jurisdiction under § 1343(4), it is unnecessary to discuss the jurisdictional issue under 28 U.S.C. § 1331.[3] Therefore, motion of defendants as to the cause of action under § 1973 and the attack of the jurisdiction as to § 1343(4) is not well taken and is hereby DENIED.

The defendants' motion to strike attorneys' fees and the injunctive relief prayed for in paragraph V-2 is DENIED.[4]

Done, this the 29th day of December, 1975.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
29TH DAY OF DECEMBER, 1975
WILLIAM J. O'CONNOR, CLERK

[3] The complaint alleges an amount in controversy of $10,000 or more, but briefs claim the jurisdictional amount is based on a $10,000 loss to defendants rather than to the plaintiffs. For a good discussion of the right to proceed under § 1331 with less than the $10,000 jurisdictional amount, see *Cortright* v. *Resor*, 325 F. Supp. 797 (D.C. N.Y. 1971) at p. 808. The case was reversed for other reasons.

[4] See the amendment to the Act approved August 6, 1975. "Section 402. Section 14 of the Voting Rights Act of 1965 is amended by adding at the end thereof the following new subsection: (e) In any action or proceeding to enforce the guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of these costs." *Supra*, footnote 2.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JAN. 13, 1976
WILLIAM J. O'CONNOR, CLERK

LEILA G. BROWN, et al.,
Plaintiffs,

v.

CIVIL ACTION
No. 75-298

JOHN L. MOORE, et al.,
Defendants.

PRELIMINARY PRETRIAL ORDER

You are hereby ORDERED to confer with opposing counsel on or before January 28, 1976, and together prepare in writing and file with the court not lesss than 24 hours prior to the pretrial set on the 4th day of February, 1976, in this cause, in a JOINT DOCUMENT, the following:

FOR THE PLAINTIFF

1. A brief statement of the cause of action for each count which includes the theory of the count.

2. A brief summary of plaintiff's contentions of facts in support of his cause(s) of action.

FOR THE DEFENDANT

1. A brief statement of the defense(s) including the theory of each defense.

2. A brief summary of defendant's contentions of facts in support of his defense(s).

FOR THE INTERVENOR(S), THIRD PARTY PLAINTIFF(S), [DEFENDANTS], ETC.

1. A brief statement of your theory of interest, cause(s) of action, defense(s), etc.

2. A brief summary of facts in support of your legal theories.

Each of the parties will present to opposing counsel at the conference the matters set out above for incorporation in a joint document.

FOR ALL PARTIES

In addition, the joint document is to include the following:

1. All admitted or uncontested facts.
2. Each party's brief statement of contested facts.
3. Each party's statement of contested legal issues.

All of the above is to be incorporated in one document which is to be signed by all attorneys prior to the filing.

Done, this the 7th day of January, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

cc: J. U. Blacksher
Edward Still, Birmingham
James C. Wood

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. DIST. COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
19TH DAY OF JANUARY, 1976
MINUTE ENTRY NO. 39815
WILLIAM J. O'CONNOR, CLERK
BY_____
DEPUTY CLERK

LEILA G. BROWN, et al.,
Plaintiffs,
v.

CIVIL ACTION
No. 75-298-P

JOHN L. MOORE, et al.,
Defendants.

ORDER

The plaintiffs have filed a motion for an order certifying that they may maintain this action as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.

The Court having considered the motion, oral argument and briefs of the parties certifies that the plaintiffs may maintain this action as a class action.

The plaintiff class for the purposes of injunctive relief under Rule 23(b)(2) F.R.Civ.P. is defined by the Court as all black persons who are now citizens of Mobile County, Alabama.

The Court finds that this class action complies with the requirements of Rule 23(a) and (b)(2) F.R.Civ.P. and that the named plaintiffs have the standing to raise the issues for the purpose of injunctive relief.

DONE at Mobile, Alabama, this 19th day of January, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
MAR. 1, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION TO ADD PARTIES DEFENDANT

Plaintiffs move the Court for an order making Robert Williams, Dan C. Alexander, Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as School Commissioners of Mobile County, Alabama, and the Board of School Commissioners of Mobile County, *qua* School Board, as parties defendants in this action, directing service of process upon them, allowing the attached Proposed Amended Complaint and setting this cause for immediate pretrial; and for grounds therefor show:

1. The above named individuals and officials were parties defendants to this action until this Court, on November 21, 1975, on information supplied by plaintiffs that the Legislature had enacted a system of single-member districts for electing the members of the School Board, dismissed the causes of action against them without prejudice.

2. On February 17, 1976 judgment was rendered in *Board of School Commissioners of Mobile County, Alabama v. John L. Moore, et al.,* Civil Action No. 96,204 in the Circuit Court of Mobile County finding that the above mentioned Act of the Legislature "is invalid and unconstitutional" and was declared void. This action was instituted by the proposed defendants. A copy of the subject Complaint and Judgment is attached hereto.

3. The aforementioned individuals and officials as defendants in this action filed responsive pleadings, propounded interrogatories to the plaintiffs and otherwise actively defended this action. There will be no prejudice to any party or delay occassioned to the disposition of this action by the addition of the aforementioned individuals, officials and School Board as defendants.

4. The jurisdiction of this court will not be impaired. Jurisdiction is invoked pursuant to 28 U.S.C. §§1343(4) and 1331. The causes of action arise from the violation of those rights secured by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution and 42 U.S.C. §1973 and, as to the individuals and officials, by 42 U.S.C. §1983.

5. Plaintiffs seek relief in that the present system of at-large elections with numbered places for each of the five positions on the Board of School Commissioners of Mobile County unconstitutionally dilutes and cancels out the voting strength of the plaintiffs. A copy of the Proposed Amended Complaint is attached hereto.

WHEREFORE, plaintiffs pray this Court will issue an order joining as defendants Robert Williams, Dan C. Alexander, Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as members of the Board of School Commissioners of Mobile County, Alabama, and the Board of School Commissioners of Mobile County, Alabama, *qua* Board; directing the issuance of process, allowing the attached Proposed Amended Complaint, and setting this cause for immediate pretrial.

Respectfully submitted this 1st day of March, 1976.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 Davis Avenue
Mobile, Alabama 36603

By: _____
J. U. BLACKSHER
GREGORY B. STEIN
LARRY MENEFEE

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JACK GREENBERG, ESQUIRE
CHARLES WILLIAMS, ESQ.
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Attorneys for Plaintiffs

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
MAR. 8, 1976
WILLIAM J. O'CONNOR, CLERK

PROPOSED AMENDED COMPLAINT

I.

Jurisdiction

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 and 1343(3) and (4). The amount in controversy exceeds $10,000 exclusive of interest and costs. This is a suit in equity arising out of the Constitution of the United States, the First, Thirteenth, Fourteenth and Fifteenth Amendments, and 28 U.S.C. §§1973 and 1983.

II.

Class Action

Plaintiffs hereby adopt and incorporate by reference Section II. of the original Complaint.

III.

Plaintiffs

Plaintiffs hereby adopt and incorporate by reference Paragraphs A, B, C, D, E, G, H, I, and J of Section III. of the orginal Complaint.

IV.

Defendants

A. Plaintiffs hereby adopt and incorporate by reference Paragraph A of Section IV. of the original Complaint.

B. Defendants Howard E. Yeager and G. Bay Haas are members of the Mobile County Commission.

C. Defendants Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions are members of the Board of School Commissioners of Mobile County.

D. Defendant Board of School Commissioners of Mobile County is the general supervisory agency of the public schools for Mobile County. It holds the legislative power granted to it by the State of Alabama and performs certain executive and administrative functions.

V.

Nature of Claim

Plaintiffs hereby adopt and incorporate by reference Section V. of the original Complaint.

VI.

Plaintiffs hereby adopt and incorporate by reference the relief sought in Section VI of the original Complaint.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
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MOBILE, ALABAMA 36603

By: _____
J. U. BLACKSHER

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35203

JACK GREENBERG, ESQUIRE
CHARLES WILLIAMS, ESQ.
SUITE 2030
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NEW YORK, N.Y. 10019

Attorneys for Plaintiffs

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 6, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION FOR CONTINUANCE

Come now Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama, who are Defendants herein, and respectfully move this Honorable Court for a continuance of this cause which is presently set upon Your Honor's docket to be called for trial on Monday, July 19, 1976. This is a non jury case. As grounds for this motion Defendants would respectfully show unto Your Honor as follows:

1. These Defendants were Defendants in this case when it was originally filed. Thereafter these Defendants were dismissed from the case upon motion of the Plaintiffs. Thereafter, also upon motion of the Plaintiffs, these Defendants were again added as Defendants in the lawsuit. In the interim period of time during which these Defendants were not a part of the lawsuit numerous steps were taken in the lawsuit by the Court in moving the case towards trial, and numerous steps were taken by the Plaintiffs and the remaining Defendants in moving themselves
toward being prepared to go to trial with the case. These Defendants did not however make the same preparation because they were not at that time Defendants in the case, having been dismissed upon Plaintiffs' motion. Since being reinstated as Defendants in the case these Defendants have not had sufficient opportunity to fully prepare themselves to defend their position in the lawsuit.

2. This case was, at a time unknown to these Defendants, placed upon the trial docket to be called for trial on

July 19, 1976 and notice thereof was given to Plaintiffs' counsel and to counsel for the other Defendants, but notice of the trial setting was not given to these Defendants or their counsel. Counsel discovered the trial setting while reviewing the Court file and the docket sheet in the office of the Clerk of the Court. By reason of this circumstance, these Defendants have until recently been unaware of the trial setting and have not prepared themselves for trial; and sufficient time does not now remain to make adequate preparation for trial of the case on July 19, 1976.

3. The case of Bolden v. City of Mobile (Civil No. 75-297-P) is set upon the Court's docket to be called for trial on Monday, July 12. Counsel is advised by counsel for the Defendant in that case that counsel does not expect the trial of that case to be completed in the week of Monday, July 12 and expects that case to carry over into the week of July 19-23.

Wherefore, these Defendants respectfully request a continuance of this cause for a period of time sufficient to enable these Defendants to adequately prepare their defense, and that the case then be reset upon this Court's docket to be called for trial.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By _____
Abe Philips, Attorneys for
Robert R. Williams, Dan C.
Alexander, Jr., Norman J. Berger,
Ruth F. Drago, and Homer L.
Sessions, individually and in
their official capacities as the
Board of School Commissioners of
Mobile County, Alabama
P. O. Box 8158
Mobile, Alabama 36608

Please be advised that these Defendants intend to call this motion to the attention of the Honorable Virgil Pittman as soon as it has been filed in the office of the Clerk of the Court, and would at that time request that they be heard upon the motion immediately.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By _____
Abe Philips, Attorneys for
Robert R. Williams, Dan C.
Alexander, Jr., Norman J. Berger,
Ruth F. Drago, and Homer L.
Sessions, individually and in
their official capacities as the
Board of School Commissioners of
Mobile County, Alabama
P. O. Box 8158
Mobile, Alabama 36608

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 12, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION FOR DEFAULT JUDGMENT

Plaintiffs, through their undersigned counsel, move the Court for an Order, pursuant to Rule 55, Federal Rules of Civil Procedure, entering a default judgment against defendants Robert Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as School Commissioners of Mobile County, Alabama, and against the Board of School Commissioners of Mobile County. As grounds for their motion, plaintiffs would show as follows:

1. This action was filed by plaintiffs on June 9, 1975, and the above-named individuals and officials, against whom default judgment is sought, were served as parties defendant.

2. Said defendants filed a motion to dismiss the complaint and a motion to strike certain portions of the complaint on July 10, 1975, appearing through their counsel, Abram L. Philips.

3. On November 21, 1975, on information supplied by plaintiffs that the Alabama Legislature had enacted a system of single-member districts for electing members of the School Board, this Court dismissed each and every cause of action against the aforesaid defendants without prejudice.

4. Shortly thereafter, the Board of School Commissioners of Mobile County, Alabama, and Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, Homer L. Sessions and Robert R. Williams, in their individual capacities and as members of said Board, filed an action in the Circuit Court of Mobile County, Alabama, attacking Act 1150, 1975 Regular Session of the Alabama Legislature, as being in violation of the Constitution of Alabama.

On February 17, 1976, judgment was rendered in *Board of School Commissioners of Mobile County, Alabama, et al.* v. *John L. Moore, et al.*, Civil Action No. 96,204, in the Circuit Court of Mobile County, finding the said Act 1150, which would have required the School Commissioners to be elected from single-member districts, to be "invalid and unconstitutional" and therefore void.

5. On or about March 1, 1976, plaintiffs herein filed a motion to add as parties defendant the aforesaid School Board and its members in their individual and official capacities. The Court granted the aforesaid motion on March 8, 1976.

6. On March 22, 1976, at the direction of the Clerk of this Court, the United States Marshal served on the defendant School Board and School Commissioners, and each of them, copies of the Clerk's notice of this Court's Order granting plaintiffs' motion to add them as parties defendant, plaintiffs' motion to add said defendants with attached amended complaint, the pretrial order dated February 4, 1976, the joint pretrial document filed January 28, 1976, the order on motion to dismiss entered December 29, 1975, and the motion to dismiss filed by the defendant County Commissioners on or about July 8, 1975.

7. Abram L. Philips, Jr., as counsel for the defendant School Board and School Commissioners, was timely served with notices of the several depositions of experts retained by plaintiffs and by the defendant County Commissioners, all of which depositions were taken after the School Board defendants were served with notice of their joinder. Counsel for the School Board defendants did not, however, attend or participate in said depositions. Mr. Philips was served with copies of all pleadings and other documents filed by plaintiffs after March 22, 1976.

8. However, the defendant School Board and School Commissioners have failed to plead or otherwise defend against the amended complaint served on their counsel on March 22, 1976.

9. The evidence of record in this action establishes, as a matter of law, prima facie proof that the present system of electing members of the Board of School Commissioners of Mobile County discriminates against black residents of Mobile County in that their concentrated strength is diluted and minimized by the larger white majority in the county, so that plaintiffs and the class they represent are entitled to the relief prayed for in their amended complaint, including a declaratory judgment that the system for electing members of the Board of School Commissioners of Mobile County violates their rights under the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1973 and 1983.

a. The depositions of plaintiffs' expert witnesses, Dr. Cort B. Schlichting and Dr. Charles Cotrell, on file with this Court establish that the slating process or candidate selection process for Mobile County School Commissioners, namely the Democratic Party Primary, is not open on an equal basis to black citizens because the history of racial discrimination and the persistence of racially polarized voting severely dilutes the voting strength of plaintiffs and the class they represent. This Court can take judicial notice of the fact that since 1962, no less than four highly qualified black citizens of Mobile County have been defeated in the Democratic Primary as candidates for the School Board.

b. This Court can take judicial notice of the elected School Commissioners' unresponsiveness to the interest of black citizens as appears in the records of this Court, *Birdie Mae Davis* v. *Board of School Commissioners of Mobile County*, Civil Action No. 3003-63-H.

c. The action of the Legislature of Alabama in 1975 instituting a single-member district scheme for electing Mobile County School Commissioners conclusively establishes that the State of Alabama has

only a tenuous state policy supporting the use of multi-member districts.

d. This Court can take judicial notice of the fact that the existence of past racial discrimination precludes the effective participation of black citizens in the election system for the Mobile County Board of School Commissioners. See Plaintiffs' Proposed Findings of Fact and Conclusions of Law filed in this action.

e. The above proof of unconstitutional dilution of black citizens' voting strength with respect to the election of Mobile County School Commissioners is enhanced by the existence of a single large district by majority vote requirements, by the numbered-place system and by the lack of provision for at-large candidates running from particular geographical subdistricts. *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973)(en banc), *aff'd sub nom, East Carroll Parish School Board* v. *Marshall,* 96 S.Ct. 1083 (1976).

WHEREFORE, plaintiffs pray that the Court will grant their motion and thereupon enter a default judgment against defendants Board of School Commissioners of Mobile County, Alabama, and Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as Board members, as follows:

(1) Declaring that the Alabama statute presently used to establish an at-large voting system for the election of members of the Mobile County Board of School Commissioners is unconstitutional;

(2) Enjoining John L. Moore, John E. Mandeville and Thomas J. Purvis, in their official capacities as the Board of Election Supervisors in Mobile County from certifying the results of any election or primary election for the members of the Board of School Commissioners of Mobile County (or any body succeeding said Board)

pursuant to or based on the at-large or numbered-place provisions of the present Alabama statute.

(3) Ordering the defendants and the plaintiffs to file a joint plan, or separate plans if unable to agree on a joint plan, for the election of School Commissioners from fairly apportioned single-member districts which will ensure equal representation for all citizens of Mobile County;

(4) Upon final court approval of a new election plan, ordering new elections for all Mobile County School Commissioners in the primaries and general elections to be held in Mobile County in 1978; and

(5) Following entry of a final order herein, taxing plaintiffs' costs and attorneys' fees against the defendant School Board and School Commissioners in amounts to be determined upon appropriate motion by plaintiffs.

Respectfully submitted this 12 day of July, 1976.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 Davis Avenue
Mobile, Alabama 36603

By: _____
J. U. BLACKSHER
LARRY MENEFEE

EDWARD STILL, ESQUIRE
Suite 601—Title Building
2030 Third Avenue, North
Birmingham, Alabama 35203

JACK GREENBERG, ESQUIRE
CHARLES WILLIAMS, III, Esq.
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New York, N.Y. 10019

Attorneys for Plaintiffs

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 12, 1976
WILLIAM J. O'CONNOR, CLERK

SECOND MOTION FOR CONTINUANCE

Come now Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama, who are Defendants herein, and respectfully move this Honorable Court for a continuance of this cause which is presently set upon Your Honor's docket to be called for trial on Monday, July 19, 1976, and as grounds for this motion would respectfully show unto Your Honor as follows:

1. To the extent that it relates to these Defendants, this cause is predicated upon allegations that the present election system provided by the law of Alabama for the election of the membership of the Mobile County School Board, which operates the Public School System of the County, is unconstitutional because it discriminates against certain citizens in violation of the United States Constitution. This present system of election provides for a Board of five members, each elected by a vote of the qualified electors of the county at large.

The election system complained of was not created by and is not maintained by these Defendants; they merely occupy the positions on the School Board by virtue of their election to said positions in the manner provided by state law. They have no power to change the system by any action of their own.

The election system is provided by state law. It exists in its present form by virtue of Acts previously passed by the State Legislature, and it can lawfully be changed only

by an amendment to the Constitution of the State of Alabama or Acts that may hereafter be passed by the Legislature, absent some judicial order imposing change if the Legislature does not itself make such change as may be necessary to provide a constitutional system, if indeed the present system is found to be unconstitutional.

Subsequent to the filing of this cause in this Court, the State Legislature passed an Act (Act No. 1150 of the 1975 Regular Session) reapportioning the School Board into five single member districts. Passage of this Act by the Legislature was procured by the Plaintiffs in this cause with the cooperation and assistance of these Defendants; and following the passage thereof the Plaintiffs moved this Court to dismiss these Defendants from this cause (and in essence to dismiss the School Board portion of the lawsuit) because said Act 1150 provided a constitutional system of electing the School Board. Receiving no objections from any of the Defendants, this Court granted the motion and dismissed these Defendants from the case.

Thereafter said Act 1150 was discovered to be fatally defective and was declared void by the Circuit Court of Mobile County because of technical deficiencies in the enactment thereof by the State Legislature in a manner contrary to the Alabama Constitution. When this occurred, upon motion of the Plaintiffs made ex parte and considered by this Court without these Defendants having an opportunity to be heard, the Court reinstated these Defendants as Defendants in this cause.

At the time of their reinstatement as Defendants these Defendants were totally unprepared to proceed immediately as parties to this cause, for reasons that are set out in more detail in additional grounds for this motion referred to hereafter. Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants have expected and have been awaiting the Plaintiff to procure passage of another Act by the Legisla-

ture providing for an acceptable system of electing the School Board just as did said Act 1150 which was unfortunately technically defective. Having now perceived no further activity upon the part of the Plaintiffs in that direction, these Defendants have themselves undertaken to initiate such action, as a consequence of which there has been introduced into the Alabama House of Representatives, and is now under consideration by the Alabama House of Representatives designated as House Bill 1060, Regular Session 1976, a Bill which, when enacted, will reapportion the school board into five single member districts in a manner essentially identical to that previously provided by Act 1150 of the Regular Session 1975, upon the basis of which this Court earlier dismissed these Defendants from this cause and thereby terminated the School Board aspect of the case.

Upon the basis of these occurrences these Defendants respectfully suggest to this Honorable Court that it is both undesirable and unnecessary for the School Board aspect of this case to proceed to trial at this time; and again, respectfully move the Court for a continuance of this cause from the present trial setting of July 19, 1976.

2. Upon passage of Act 1150 by the 1975 Regular Session of the Legislature, and the subsequent dismissal of these Defendants from this cause because of the passage of said Act, these Defendants set aside all activity toward preparing a defense to this cause. The Plaintiffs, and the remaining Defendants however continued their preparation for trial of the cause. Numerous steps were taken in the cause by the Court in moving the case towards trial, and numerous steps were taken by the Plaintiffs and the remaining Defendants in moving themselves toward being prepared to go to trial with the case. These Defendants did not however make the same preparation because they were not Defendants in the case and did not anticipate having to go to trial. As the record will reveal, both the Plaintiffs and the other Defendants herein have laid the

ground work for presentation of positions based primarily upon the testimony of a number of expert witnesses who have been preparing themselves to testify at length, and whose preparation has included the compilation and analysis of a vast amount of technical and statistical data. These Defendants were prepared to undertake a similar defense, but upon being removed from the case as Defendants, they did not engage the services of qualified experts and did not pursue preparation of the necessary information to present a defense.

Since being reinstated as Defendants in this case upon motion of the Plaintiffs, these Defendants have not had sufficient opportunity to prepare themselves to defend their position in the lawsuit. Based upon the experience of the Plaintiffs and the other Defendants in this cause, a period of some four to six months would be required to permit the Defendants to prepare themselves to make an adequate defense. If this motion for continuance is not granted the Defendants will have been, by the motion of the Plaintiffs removing them from the lawsuit and the subsequent motion of the Plaintiffs adding them back as Defendants in the lawsuit, effectively prevented from making a defense in the lawsuit.

3. This case was, at a time unknown to these Defendants, placed upon the trial calender to be called for trial on July 19, 1976, and notice of the trial setting was given to Plaintiffs' counsel and to counsel for the other Defendants, but notice of the trial setting was not given to these Defendants or their counsel. Counsel for these Defendants discovered the trial setting while reviewing the Court file and the docket sheet in the office of the Clerk of the Court. By reason of this circumstance, these Defendants have until recently been unaware of the trial setting and have not prepared themselves for trial; and sufficient time does not now remain to make adequate preparation for trial of the case on July 19, 1976. Observation of the

notices of trial setting which are in the Court file will confirm that the notices were sent to all counsel except counsel for these Defendants. No criticism is directed to the Clerk of the Court or to the Court in this regard; this circumstance is simply pointed out as a matter of fact.

4. The case of Bolden v. City of Mobile (Civil No. 75-297-P) is set upon the Court's docket to be called for trial on Monday, July 12. Counsel for these Defendants is advised by counsel for the Defendants in that case that counsel does not expect the trial of that case to be completed in the week of July 12-16 and expects the case to carry over into the week of July 19-23.

5. Counsel representing the other Defendants in this cause have been consulted and have advised that they concur in this motion for a continuance of the entire cause. In the alternative, if the Court is disinclined to continue the entire cause these Defendants respectfully request the Court to sever the cause of action against these Defendants from the cause of action against the other Defendants and continue as a separate case only the cause of action against these Defendants.

WHEREFORE these Defendants respectfully request a continuance of this cause for a period of time sufficient to determine if the Legislature of the State of Alabama enacts House Bill 1060 referred to hereinabove, in which case it will not be necessary for this cause to go to trial in any event; and for a period of time sufficient for these Defendants to adequately prepare their defense if the Legislature does not enact House Bill 1060 and it becomes necessary for the School Board portion of this cause to be tried before this Court.

These Defendants respectfully request the opportunity to be heard by this Court on this motion; they request that at such hearing they be allowed to present the testimony of witnesses in support of this motion; and they request that at such hearing the proceeding be recorded by the Court Reporter.

PILLANS, REAMS, TAPPAN, WOOD, ROBERTS & VOLLMER

By _____
Abe Phillips, Attorneys for Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama
P. O. Box 8158
Mobile, Alabama 36608

Please be advised that these Defendants intend to call this motion to the attention of the Honorable Virgil Pittman as soon as it has been filed in the office of the Clerk of the Court, and would at that time request that they be heard upon the motion immediately.

PILLANS, REAMS, TAPPAN, WOOD, ROBERTS & VOLLMER

By _____
Abe Phillips, Attorneys for Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama
P. O. Box 8158
Mobile, Alabama 36608

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[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 12, 1976
WILLIAM J. O'CONNOR, CLERK

ANSWER TO AMENDED COMPLAINT

Come now the Defendants, the Board of School Commissioners of Mobile County and Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, individually and in their official capacities as members of said Board, and, in answer to the named Plaintiffs' complaint, say:

FIRST DEFENSE

The complaint as amended fails to state a claim against these Defendants upon which relief can be granted.

SECOND DEFENSE

To the extent that this action is based upon 42 U.S.C. Section 1973 the complaint fails to state a claim upon, which relief can be granted since the complaint affirmatively shows that no Plaintiff is among those empowered to bring enforcement actions under any provision of the Voting Rights Act of 1965.

THIRD DEFENSE

To the extent that this action is based upon 28 U.S.C. Section 1331 there is a want of subject matter jurisdiction in this Court since it appears to a legal certainty that the claim of each class member is in reality for less than the requisite jurisdictional amount in controversy.

FOURTH DEFENSE

To the extent that this action is based upon 28 U.S.C. Section 1973 the complaint fails to state a claim upon which relief can be granted because that statute creates no new right

the violation of which is actionable, but instead only a new remedy to implement previously held rights.

FIFTH DEFENSE

To the extent that this action is against the Board of School Commissioners of Mobile County and is based upon a remedy inferred from the Constitution, cognizable under 28 U.S.C. Section 1331, the complaint fails to state a claim upon which relief can be granted.

SIXTH DEFENSE

To the extent that this action is against the Board of School Commissioners of Mobile County and is based upon 42 U.S.C. Section 1983, the complaint fails to state a claim upon which relief can be granted, because said Board is not a "person" within the intendment of that statute.

SEVENTH DEFENSE

I. Jurisdiction

Defendants admit that this Court has subject matter jurisdiction of this cause insofar as it is a claim against the said commissioners under 42 U.S.C. Section 1983, jurisdictionally premised upon 28 U.S.C. Section 1343. In all other respects the allegations of Section I of the complaint are denied.

II. Class Action

1. Defendants admit that the named Plaintiffs purport to represent a class composed of all black citizens of Mobile County, Alabama, but deny that this action may properly be maintained as a class action on behalf of such persons.

2. Defendants deny that blacks as such are adversely affected by any practices of Defendants.

3. Defendants deny that blacks are, or continue to be, deprived of the equal protection of the law in Mobile County,

Alabama with regard to the election of members of the Board of School Commissioners of Mobile County.

4. Defendants admit that the joinder of all members of the purported class would be impracticable.

5. Defendants deny that the named Plaintiffs may properly represent all black citizens of Mobile County. Defendants say, on the contrary, that the political ideas of the named Plaintiffs with respect to the issue in this case are not shared by all blacks in the county; that there is disparity among black citizens, as there is among white citizens, with respect to the form of governance of the Mobile County Public School System which is desired.

6. Defendants deny that they have acted or refused to act on grounds generally applicable to the purported class.

7. Defendants deny that injunctive or declaratory relief with respect to the purported class is proper.

8. Except as herein expressly admitted, Defendants deny all allegations of Section II of the complaint.

III. Plaintiffs

Defendants admit the allegations of Section II of the complaint.

IV. Defendants

1. Defendants admit the allegations of paragraphs A, B, and C, of Section IV of the complaint.

2. As to the allegations of paragraph D, Defendants admit that the Board of School Commissioners of Mobile County is the governing body of the Mobile County Public School System by virtue of, but only to the extent provided by, the Constitution of Alabama and statutes enacted from time to time by the Legislature of the State of Alabama. Pursuant to such authority, the Board performs certain executive and administrative functions and holds limited legislative powers. Plenary legislative authority over the affairs of the School System is vested in the legislature of the State of Alabama.

V. Nature of Claim

1. As to the allegations of paragraphs A and B, Defendants admit that the Mobile County Commission is the governing body of Mobile County by virtue of, but only to the extent allowed by, statutes enacted from time to time by the Legislature of the State of Alabama. Pursuant to such statutes, the commission performs certain executive and administrative functions and holds limited legislative powers. Plenary legislative authority over the affairs of the county is vested in the Legislature of the State of Alabama. The three county commissioners are elected at large to numbered places.

2. As to paragraph C Defendants admit that the Board is composed of five members elected at large to six year terms; and deny the remaining allegations of that paragraph.

3. As to paragraphs D, E and F Defendants do not have sufficient information to admit these allegations and for lack of such information must deny them and demand strict proof thereof.

4. Except as herein expressly admitted, Defendants deny all allegations of Section V of the complaint.

VI. Relief

Defendants deny the allegations of Section VI of the complaint and deny that the relief sought by the named Plaintiffs is necessary or proper.

VII. Defendants further deny every allegation of the complaint not expressly admitted by this answer.

EIGHTH DEFENSE

All aspects of the governance and operation of the Mobile County Public School System are subject to determination by the Legislature of the State of Alabama. In the exercise of its discretion, the Legislature has provided that the School System shall be governed by a Board of five persons and has provided

the method to be used in electing them. Under our federal constitutional system, the determination of such matters is committed to state government and its components for resolution. The system chosen by the Legislature does not unconstitutionally deprive any of the many identifiable segments of the county from equal access to the electoral process, or discriminate for or against any such segment, and the continued existence of such system should be permitted by the judicial branch of the United States government.

NINTH DEFENSE

The choice of the form of governance of the Public School Systems of this country is a political issue committed under our federal system to the states for resolution and, in the case of Mobile County, the issue has been resolved by the people of Alabama through their Constitution and by the Legislature of the State of Alabama through the enactment of statutes, providing for the form of governance that now exists.

TENTH DEFENSE

To the extent that it relates to these Defendants, this cause is predicated upon allegations that the present election system provided by the law of Alabama for the election of the membership of the Mobile County School Board, which operates the Public School System of the County, is unconstitutional because it discriminates against certain citizens in violation of the United States Constitution. This present system of election provides for a Board of five members, each elected by a vote of the qualified electors of the county at large.

The election system complained of was not created by and is not maintained by these Defendants; they merely occupy the positions on the School Board by virtue of their election to said positions in the manner provided by state law. They have no power to change the system by any action of their own. The election system is provided by state law. It exists in its present

form by virtue of Acts previously passed by the State Legislature, and it can lawfully be changed only by an amendment to the Constitution of the State of Alabama or Acts that may hereafter be passed by the Legislature.

Subsequent to the filing of this cause in this Court, the State Legislature passed an Act (Act No. 1150 of the 1975 Regular Session) reapportioning the School Board into five single member districts. Passage of this Act by the Legislature was procured by the Plaintiffs in this cause with the cooperation and assistance of these Defendants; and following the passage thereof the Plaintiffs moved this Court to dismiss these Defendants from this cause, and in essence to dismiss the School Board portion of the lawsuit, because said Act 1150 provided a constitutional system of electing the School Board. Receiving no objections from any of the Defendants, this Court granted the motion and dismissed these Defendants from the case.

Thereafter said Act 1150 was discovered to be fatally defective and was declared void by the Circuit Court of Mobile County because of technical deficiencies in the enactment thereof by the State Legislature in a manner contrary to the Alabama Constitution. When this occurred, upon motion of the Plaintiffs made ex parte and considered by this Court without these Defendants having an opportunity to be heard, the Court reinstated these Defendants as Defendants in this cause.

At the time of their reinstatement as Defendants these Defendants were totally unprepared to proceed immediately as parties to this cause. Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants have expected and have been awaiting the Plaintiffs to procure passage of another Act by the Legislature providing for an acceptable system of electing the School Board just as did said Act 1150 which was unfortunately technically defective. Having now perceived no further activity upon the part of the Plaintiffs in that direction, these Defendants have themselves undertaken to initiate such action, as a consequence

of which there has been introduced into the Alabama House of Representatives, and is now under consideration by the Alabama House of Representatives designated as House Bill 1060, Regular Session 1976, a Bill which, when enacted, will reapportion the School Board into five single member districts in a manner essentially identical to that previously provided by Act 1150 of the Regular Session 1975, upon the basis of which this Court earlier dismissed these Defendants from this cause and thereby terminated the School Board aspect of the case.

ELEVENTH DEFENSE

The relief sought by Plaintiffs in this cause ought not to be granted because, in order for any court ordered single member district plan to be imposed that would avoid the existence of a School Board without electoral responsibility and consequent deprivation of due process and equal protection of law, it would be necessary to change the form of governance of the School System that has heretofore been validly and properly enacted by the Legislature of Alabama. The choice of a form of governance for the Public School Systems of this country is a function which our federal constitution entrusts to state government and its components, and the imposition of a different form by a United States Court would violate established constitutional principles of comity and federalism.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By _____
Abe Philips, Attorneys for
Defendants
P. O. Box 8158
Mobile, Alabama 36608

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 13, 1976
WILLIAM J. O'CONNOR, CLERK

RESPONSE TO MOTION FOR DEFAULT JUDGMENT

Come now Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions, individually and in their official capacities as the Board of School Commissioners of Mobile County, Alabama, who are Defendants herein, and respectfully make this response to the Motion for Default Judgment filed in this cause on July 12, 1976:

1. On July 12, 1976 these Defendants filed an answer to the Plaintiffs' Complaint as amended, containing eleven separate defenses.

2. Contrary to the averments of the Motion for Default, these Defendants have sought to defend against the Plaintiffs' Complaint, and on July 6, 1976 filed a Motion for Continuance in an effort to obtain sufficient time to prepare an adequate defense; something that has been denied them as more specifically referred to in paragraph (4) of this response. That motion being denied by the Court, on July 12, 1976 these Defendants filed a Second Motion for Continuance in a further effort to obtain sufficient time to prepare an adequate defense.

3. The burden of proof of unconstitutionality is upon the Plaintiffs; *White* v. *Regester*, 412 U.S. 755, 766 (1973). The evidence now of record, even unrebutted by the Defendants as it now is, does not acquit that burden.

(a) Multimember district schemes are not per se unconstitutional; *Zimmer* v. *McKeithen*, 485 F.2d. 1297 (5th Cir. 1973, en banc); *Nevett* v. *Sides*, F.2d. (5th Cir. June 8, 1976).

(b) The evidence of record does not establish that the statute establishing the present system of electing the members of the School Board has a "racially discriminatory purpose"; *Washington* v. *Davis,* U.S. , 44 U.S.L.W. 4789 (U.S. June 7, 1976).

(c) The evidence of record does not establish that the present system of electing members of the School Board operates to "dilute" the voting strength of the Plaintiff class, as such "dilution" has been defined by the courts; *Zimmer* v. *McKeithen,* supra; *Nevett* v. *Sides,* supra; and *Rev. Charles H. Nenett* v. *Lawrence G. Sides, et al.,* C.A. 73-P-529-S Northern District of Alabama (Order of June 11, 1976). It has *not* been established that blacks in Mobile County lack access to the process of slating candidates. It has *not* been established that the School Board is unresponsive to the particularized interests of blacks in the county. It has *not* been established that the present system of electing members of the School Board is the product of a tenuous state policy underlying a preference for multi-member or at-large districting. It has *not* been established that past discrimination in general precludes the effective participation of blacks in the election system. None of these *primary* factors have been established!

(d) Before the Court can fashion relief, it must first have found a constitutional violation; *Dallas County* v. *Reese,* 421 U.S. 477 (1975).

4. To the extent that it relates to these Defendants, this cause is predicated upon allegations that the present election system provided by the law of Alabama for the election of the membership of the Mobile County School Board, which operates the Public School System of the County, is unconstitutional because it discriminates against certain citizens in violation of the United States Constitution. This present system of election provides for a Board of five members, each elected by a vote of the qualified electors of the county at large.

The election system complained of was not created by and is not maintained by these Defendants; they merely occupy the positions on the School Board by virtue of their election to said positions in the manner provided by state law. They have no power to change the system by any action of their own. The election system is provided by state law. It exists in its present form by virtue of Acts previously passed by the State Legislature, and it can lawfully be changed only by an amendment to the Constitution of the State of Alabama or Acts that may hereafter be passed by the Legislature.

Subsequent to the filing of this cause in this Court, the State Legislature passed an Act (Act No. 1150 of the 1975 Regular Session) reapportioning the School Board into five single member districts. Passage of this Act by the Legislature was procured by the Plaintiffs in this cause with the cooperation and assistance of these Defendants; and following the passage thereof the Plaintiffs moved this Court to dismiss these Defendants from this cause (and in essence to dismiss the School Board portion of lawsuit) because said Act 1150 provided a constitutional system of electing the School Board. Receiving no objections from any of the Defendants, this Court granted the motion and dismissed these Defendants from the case.

Thereafter said Act 1150 was discovered to be fatally defective and was declared void by the Circuit Court of Mobile County because of technical deficiencies in the enactment thereof by the State Legislature in a manner contrary to the Alabama Constitution. When this occurred, upon motion of the Plaintiffs made ex parte and considered by this Court without these Defendants having an opportunity to be heard, the Court reinstated these Defendants as Defendants in this cause.

At the time of their reinstatement as Defendants these Defendants were totally unprepared to proceed immediately as parties to this cause. Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants had expected and had been awaiting the Plaintiffs to procure passage of another Act by the Legislature providing for an acceptable system of electing the School Board just as did said Act 1150 which was unfortunately technically

defective. Having perceived no further activity upon the part of the Plaintiffs in that direction, these Defendants have themselves undertaken to initiate such action, as a consequence of which there has been introduced into the Alabama House of Representatives, and is now under consideration by the Alabama House of Representatives designated as House Bill 1060, Regular Session 1976, a Bill which, when enacted, will reapportion the School Board into five single member districts in a manner essentially identical to that previously provided by Act 1150 of the Regular Session 1975, upon the basis of which this Court earlier dismissed these Defendants from this cause and thereby terminated the School Board aspect of the case.

Upon passage of Act 1150 by the 1975 Regular Session of the Legislature, and the subsequent dismissal of these Defendants from this cause because of the passage of said Act, these Defendants set aside all activity toward preparing a defense to this cause. The Plaintiffs, and the remaining Defendants however continued their preparation for trial of the cause. Numerous steps were taken in the cause by the Court in moving the case towards trial, and numerous steps were taken by the Plaintiffs and the remaining Defendants in moving themselves toward being prepared to go to trial with the case. These Defendants did not however make the same preparation because they were not Defendants in the case and did not anticipate having to go to trial. As the record will reveal, both the Plaintiffs and the other Defendants herein have laid the ground work for presentation of positions based primarily upon the testimony of a number of expert witnesses who have been preparing themselves to testify at length, and whose preparation has included the compilation and analysis of a vast amount of technical and statistical data. These Defendants were desirous of undertaking a similar defense, but upon being removed from the case as Defendants, they did not engage the services of qualified experts and did not pursue preparation of the necessary information to present a defense.

Since being reinstated as Defendants in this case upon motion of the Plaintiffs, these Defendants have not had sufficient opportunity to prepare themselves to defend their

position in the lawsuit. For this reason, on July 6, 1976 these Defendants filed a Motion for Continuance, and on July 12, 1976 a Second Motion for Continuance.

In the meantime this case was, at a time unknown to these Defendants, placed upon the trial calendar to be called for trial on July 19, 1976, and notice of the trial setting was given to Plaintiffs' counsel and to counsel for the other Defendants, but notice of the trial setting was not given to these Defendants or their counsel. Counsel for these Defendants discovered the trial setting while reviewing the Court file and the docket sheet in the office of the Clerk of the Court. By reason of this circumstance, these Defendants have until recently been unaware of the trial setting and have not fully prepared themselves for trial.

At the same time the trial setting was discovered, counsel also discovered and became consciously aware that an Amended Complaint had been filed by the Plaintiffs, to which no motion or answer had been filed in behalf of these Defendants; following which counsel began preparation of the answer in behalf of these Defendants that was filed in this Court on July 12, 1976.

Wherefore, these Defendants respectfully urge to this Court that justice cannot be served by the granting of a Default Judgment against these Defendants; and, therefore, respectfully urge this Court to deny the Motion for Default Judgment.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By_____

Abe Philips, Attorneys for
Defendants
P.O. Box 8158
Mobile, Alabama 36608

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. DIST COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 20, 1976
WILLIAM J. O'CONNOR, CLERK

LEILA G. BROWN, et al.,
Plaintiffs,

v.

JOHN L. MOORE, individually and in his capacity as Probate Judge of Mobile County, et al.,
Defendants.

CIVIL ACTION NO. 75-298-P

PRELIMINARY PRETRIAL ORDER

You are hereby ORDERED to confer with opposing counsel on or before July 28, 1976, and together prepare in writing and file with the court by 5:00 p.m. on July 30, 1976, for the pretrial set on the 2nd day of August, 1975, at 11:00 a.m. in this cause, in a JOINT DOCUMENT, the following:

FOR THE PLAINTIFF

1. A brief statement of the cause of action for each count which includes the theory of the count.

2. A brief summary of plaintiff's contentions of facts in support of his cause(s) of action.

FOR THE DEFENDANT

1. A brief statement of the defense(s) including the theory of each defense.

2. A brief summary of defendant's contentions of facts in support of his defense(s).

FOR THE INTERVENOR(S), THIRD–PARTY PLAINTIFF(S), [DEFENDANTS], ETC.

1. A brief statement of your theory of interest, cause(s) of action, defense(s), etc.

2. A brief summary of facts in support of your legal theories.

Each of the parties will present to opposing counsel at the conference the matters set out above for incorporation in a joint document.

FOR ALL PARTIES

In addition, the joint document is to include the following:

1. All admitted or uncontested facts.
2. Each party's brief statement of contested facts.
3. Each party's statement of contested legal issues.

All of the above is to be incorporated in one document which is to be signed by all attorneys prior to the filing.

Done, this the 14th day of July, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

cc: J.U. Blacksher
Edward Still, Birmingham
Jack Greenberg, James M. Nabrit, III, and Charles E. Williams, III
Abe Philips
James C. Wood
Ralph Kennamer

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 29, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION TO STRIKE

Plaintiffs, through their undersigned counsel, move the Court to strike from the answer to amended complaint filed on or about July 12, 1976, by defendants Board of School Commissioners of Mobile County and Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, the following allegations on pages 7 and 8 thereof:

> Passage of [Act No. 1150 of the 1975 Regular Session] by the Legislature was procured by the Plaintiffs in this cause with the cooperation and assistance of these Defendants, and following the passage thereof the Plaintiffs moved this Court to dismiss these Defendants from this cause, and in essence to dismiss the School Board portion of the lawsuit, because said Act 1150 provided a constitutional system of electing the School Board. . . .
>
> . . .
>
> . . . Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants have expected and have been awaiting the Plaintiffs to produce passage of another Act by the Legislature providing for an acceptable system of electing the School Board just as did said Act 1150 which was unfortunately technically defective. . . Having now perceived no further activity upon the part of Plaintiffs in that direction, these Defendants have themselves undertaken to initiate such action. . . .

Plaintiffs further move that substantially similar allegations be stricken from pages 2-3 of the aforesaid defendants' second motion for continuance, filed on or about July 12, 1976, and from pages 3-4 of the aforesaid defendants' response to motion for default judgment filed on or about July 13, 1976. As grounds for their motion, plaintiffs would show unto the Court as follows:

1. Rule 11, Federal Rules of Civil Procedure, provides:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that, it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this Rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served.

2. The record in this cause and the attached affidavit of undersigned counsel for plaintiffs show that the aforesaid allegations of defendants (except for that which alleges that plaintiffs moved this Court to dismiss these defendants) are untrue and that counsel for defendants should have known they were untrue.

3. In fact, Act No. 1150 of the 1975 Regular Sessions was introduced by Representative Cain J. Kennedy of Prichard without the cooperation or assistance of plaintiffs herein, plaintiffs' counsel, the Non Partisan Voters League or John L. LeFlore, and independent of them. It is true that Representative Kennedy was a member of the law firm of undersigned counsel at the time he introduced the bill, but Representative Kennedy was acting in his capacity as a Representative of the people of Alabama and without the cooperation or collusion of undersigned counsel or other lawyers in his firm. In fact, Representative Kennedy completely severed his relationship with undersigned counsel's law firm on October 1, 1975, before said Act 1150 was enacted by the Legislature of Alabama.

4. While it is true, as reflected in this Court's order of November 21, 1975, that the School Board defendants were dismissed without prejudice upon the oral motion of plaintiffs' counsel, this Court knows, as does counsel for the defendants, that said oral motion was based on the mootness of plaintiffs' attack on the then superseded form of electing school commissioners, and was in no way intended to express approval or disapproval of the constitutionality of the electoral system established by Act No. 1150.

5. There is absolutely no basis for defendants' allegation that they had reason to expect plaintiffs would subsequently procure passage of another act by the Legislature of Alabama.

Not only were plaintiffs not responsible for the introduction or passage of Act No. 1150, but there was never any communication between plaintiffs and defendants or between their counsel which gave plaintiffs or their counsel any notion of the alleged expectations. Thus, this allegation by defendants is patently untrue and uncalled for.

WHEREFORE, Plaintiffs pray that the Court will grant their motion and strike the above referenced allegations from the answer, second motion for continuance and response to motion for default judgment filed by defendants Board of School Commissioners of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions, as sham and false.

Respectfully submitted this 27th day of July, 1976.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
1407 DAVIS AVENUE
MOBILE, ALABAMA 36603

BY: _____
J. U. BLACKSHER
LARRY MENEFEE
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NEW YORK, N. Y. 10019

Attorneys for Plaintiffs

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

AFFIDAVIT

STATE OF ALABAMA
COUNTY OF MOBILE } ss:

J. U. Blacksher, Esquire, being duly sworn deposes and says as follows:

I am one of the attorneys representing plaintiffs in the above styled action. This affidavit is submitted in support of plaintiffs' motion to strike certain allegations from the answer, second motion for continuance, and response to motion for default judgment filed by defendants Board of School Commissioners of Mobile County, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago and Homer L. Sessions. Act No. 1150 of the 1975 Regular Session was introduced by Representative Cain J. Kennedy of Prichard, Alabama. At the time he introduced the bill that subsequently became Act No. 1150, Mr. Kennedy was a partner in my law firm. However, Mr. Kennedy did not consult me about the bill before he filed it, nor did any of the plaintiffs or their counsel participate in any way in the formulation of the electoral plan that was proposed by Mr. Kennedy, who was acting independent of his relationship with my law firm and in his capacity as a Representative of the people of Alabama. Mr. Kennedy has never appeared as counsel of record for plaintiffs in this action. In any event, Representative Kennedy completely severed his relationship with my law firm on October 1, 1975, well before Act 1150 was passed and the School Board defendants dismissed from this action.

2. This Court is aware that I proposed dismissal of the School Board defendants from this action after Act 1150 was passed not on the basis that the electoral system provided by Act 1150 was constitutional but on the basis that its passage made plaintiffs' attack on the superseded electoral system a moot question. Plaintiffs in this action in no way procured the passage of Act 1150 of the 1975 Regular Session, and there is

absolutely no factual basis for defendants to allege that they had any right to expect plaintiffs to procure passage of another act to replace Act 1150 after it was declared void. Not only were plaintiffs and counsel in no position to procure passage of another act, particularly in view of the fact that they were actively engaged in this litigation, but no such expectations were ever communicated to us by School Board members or by their counsel. There is, therefore, absolutely no reason for allowing the defendants to defend their delay and default in this action on allegations that plaintiffs and their counsel were somehow responsible for said delay and default.

J. U. BLACKSHER
[Subscription Omitted in Printing]

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
JUL. 30, 1976
WILLIAM J. O'CONNOR, CLERK

SUPPLEMENTAL JOINT PRETRIAL DOCUMENT RELEVANT TO MOBILE COUNTY SCHOOL BOARD

I. PLAINTIFFS' CAUSES OF ACTION

1. Plaintiffs assert essentially one cause of action: that the present system of at-large elections for the five-member Board of School Commissioners of Mobile County effectively abridges plaintiffs' rights to vote and participate in the political process relating to the selection of School Commissioners guaranteed them by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, all in violation of 42 U.S.C. §§ 1973 and 1983.

2. Plaintiffs contend that the present at-large election system, coupled with the historical and social factors of race relations from the era of slavery to the present, for all practical purposes has excluded the black citizens of Mobile County. The plaintiff class lacks access to the political process, and their vote is substantially diluted.

3. Plaintiffs ask the Court for the following relief:

a. A declaratory judgment that the present system for electing the Board of School Commissioners of Mobile County violates the Constitution of the United States and 42 U.S.C. §§ 1973 and 1983.

b. A preliminary and permanent injunction enjoining the defendants and others acting at their direction or in concert with them from holding, supervising or certifying the results of any election for the Board of School Commissioners of Mobile County under the present at-large elec-

tion system and ordering the reapportionment of the Board of School Commissioners into racially nondiscriminatory single-member districts.

c. An award to plaintiffs of their costs in this action, including an award of reasonable attorneys' fees.

II. PLAINTIFFS' CONTENTIONS OF FACT

1. The Board of School Commissioners of Mobile County is composed of five members elected at-large for staggered six year terms. These are partisan elections with majority vote-runoff requirements for the party primaries. There are no residency requirements and the candidates run for numbered positions.

2. Four well-qualified black candidates have sought election to the school board, Dr. E. B. Goode in 1962, Dr. W. L. Russell in 1966, Ms. Jackie Jacobs in 1970 and Mrs. Lonia Gill in 1974. They each received overwhelming support in the black community and virtually no support in the white community. All of these candidates were defeated in runoff elections by white candidates. Similar effects can be seen when a white candidate receives strong support in the black community. Ms. Gerre Koffler was defeated in 1972 in a contest heavy with racial campaigning.

3. Mobile County has a total population of 317,308, of whom 32%, or 102,383, are black. Certain areas of Mobile County are almost totally devoid of black residents, while other areas of the County are virtually all-black. Segregated housing patterns have resulted in concentrations of black voting power.

4. Mobile and the State of Alabama have had a protracted history of racial discrimination in voting. Beginning in the early part of this century, many efforts have been made to disenfranchise black voters. Disenfranchisement has been accomplished by numerous devices, including poll taxes, interpretation and "literacy" tests, and all-white primaries. They succeeded in completely excluding blacks from the political

process. Virtually every barrier to black voter particiption in the governmental process has been struck down only with the assistance of federal legislation and the federal courts.[1] Plaintiffs intend briefly to review the early history of black disenfranchisement through the testimony of Dr. Melton McLaurin, Associate Professor of History, University of South Alabama. Barriers of voting and participation in the political process since World War II will also be reviewed by Dr. McLaurin and by other witnesses.

5. The long-standing history of public and private racial discrimination in Mobile and the State of Alabama and the civil rights activities of the past two decades have increased racial tension within the electorate and has caused a high racial polarization of the vote when issues or candidates have had identifiable racial appeal. This racial polarization makes the present at-large system for electing School Board members an effective barrier to the election of blacks and to the full representation of black community interests. Plaintiffs will present evidence of this polarization primarily through the testimony of their expert political scientist, Dr. Charles Cotrell. Dr. Cotrell will analyze the results of studies being conducted by plaintiffs of selected elections. Additionally, Dr. James Voyles may be questioned about the methods used and the conclusions he reached in his dissertation on Mobile Politics, which describes racial polarization of the electorate in this area during the 1960's. Other evidence of racial polarization will be published appeals to racial interests of the electorate.

6. The dilution of black voter strength is further evidenced by the historical and ongoing unresponsiveness of local government officials to the needs of the black community. Such unresponsiveness is shown by the following facts, among others:

a. Black citizens of Mobile have been forced to resort to the federal courts for relief from a wide range of racial discrimination in local government. E.g., *Davis* v. *Board of*

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[1] E.g., *Davis* v. *Schaell*, 81 E. Supp., 872 (S.D. Ala. 1948); *Sims* v. *Amos*, 336 F. Supp. 924 (M.D. Ala. 1972), aff'd 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215.

School Commissioners of Mobile County, Civil Action No. 3003-63-H (school desegregation); *Allen* v. *City of Mobile,* Civil Action No. 5409-69-P (police department discrimination); *Preston* v. *Mandeville,* Civil Action No. 5059-68-H (jury discrimination); *Anderson* v. *Mobile County Commission,* Civil Action No. 7388-72-H (employment discrimination in county government). Plaintiffs contend that, had the political process been fully open to them and their voting strength not diluted, federal litigation would not have been necessary in order for them to obtain their constitutional rights.

b. Mobile County schools were strictly segregated by race until sometime after *Davis* v. *Board of School Commissioners of Mobile County,* Civil Action No. 3003-63-H, was commenced in this Court in 1963. The record in *Davis, supra,* is itself the strongest possible evidence of black Mobilians' dissatisfaction with the policies of the county-wide School Board and the Board's refusal to respond voluntarily to black community interests. The school desegregation case has been to the Fifth Circuit at least fourteen times and to the Supreme Court twice. Even so, today there are still many unresolved controversies pending in *Davis,* including a pending motion by the black plaintiffs for further relief in both the student attendance and teacher assignment areas.

7. Both the history and practice supporting the present form of government reflects no state interest in its maintenance. There is a wide variation in the types of governments used in the school districts in the State. Indeed the passage in the 1975 Alabama Legislature of Act No. 1150 creating five single-member districts is clear evidence of no state policy supporting the present at-large system.

8. The creation of single-membered districts would substantially enhance black participation in School Board government. As evidenced by recent legislative reapportionment in the statewide case of *Sims* v. *Amos,* the election of black officials would be greatly facilitated by the institution of single-member districts.

FOR THE DEFENDANTS

DEFENSES, THEORIES OF DEFENSE AND FACTUAL CONTENTIONS IN SUPPORT THEREOF

1. Defense: The complaint fails to state a claim upon which relief can be granted.

Theory of the Defense: This action is filed against the Board of School Commissioners of Mobile County and against the individual members of the Board, seeking an Order of the Court declaring that the election system under which the members of the Board are elected violates certain sections of the United States Constitution and of the United States Code and seeking an Order of the Court reapportioning the membership of the Board. The existence of the Board of School Commissioners of Mobile County is provided for by the Constitution of the State of Alabama and various acts of the Legislature of Alabama pursuant thereto. The members of the Board of School Commissioners of Mobile County have no statutory authority, nor any authority or power from any other source, to prescribe, require, alter, change, or amend, or to regulate in any way the form or manner of existence of the Board of School Commissioners of Mobile County, or the form or manner in which members are from time to time elected to the Board. In like manner, the Judge of Probate of Mobile County and the other Defendants in this action have no power or authority from any source to regulate or effect in any way the manner in which members are elected to the Board of School Commissioners of Mobile County. Only the people of the State of Alabama by constitutional amendment, or the Legislature of the State of Alabama by legislative act, and not the Defendants in this action, have the power under the Constitution and the laws of the State of Alabama to make the changes in the manner of the election of the members of the Board of School Commissioners of Mobile County as are sought by way of relief in this action.

Contentions of fact in support of the defense: Defendants will call upon the Court to take judicial knowledge of the

provisions of the Constitution of the State of Alabama and the Acts of the Legislature of the State of Alabama providing for the existence of the Board of School Commissioners of Mobile County. A summary of these provisions is as follows:

Alabama was admitted to the Union as a state in 1819. The Act of Congress of March 2, 1819 tendering to the inhabitants of the Alabama territory admission to the Union, is set out in 3 U.S. Statutes At Large 489.

On January 10, 1826, the Alabama Legislature approved legislation providing for the establishment and maintenance of public schools in Mobile County and set up a Board of Commissioners denominated at that time as the "Mobile School Commissioners", constituting it as a body corporate with full power and authority to establish, maintain and regulate schools in the County. This was the first provision for a "public" school system in the State of Alabama. This Act is found in the Acts of Alabama, 1825-26, page 35. This Act provided for not less than thirteen nor more than twenty-five Commissioners to be elected from the County at-large for terms of five years, tying such elections and the exact number of Commissioners to be selected from time to time to statutes providing for the election of representatives to a then existing General Assembly.

In 1836 by a further Act of the Legislature (Acts of Alabama, 1836, page 43) the number of Commissioners was specifically fixed at thirteen and the term of office was reduced from five to three years. This Act continued to provide for the election of the Commissioners by general election from the county at-large.

In 1854, twenty-eight years after establishment of the Public School System for the County of Mobile, the Legislature of the State of Alabama passed the necessary legislation to set up the first public school system for the remainder of the state (Acts of Alabama, 1853-54, page 8). The prior existence for some twenty-eight years of the separate public school system in Mobile County under the governance of the Mobile School Commissioners, a public body corporate, was recognized in the

Act establishing the school system for the remainder of the state by the following provision which appears as Section 2 of Article VI of the Act of February 15, 1854:

> "As the County of Mobile now has established a public school system of its own, the provisions of this Act shall apply to the County, only so far as to authorize and require its school commissioners to draw the portion of the funds to which that county will be entitled under this Act and to make the reports of the superintendent herein required."

In 1857 the settled policy of taking Mobile County out from under the general scheme of public school legislation was written into the Constitution of Alabama of 1875 as Section 11 of Article XII; the same constitutional provision would subsequently be carried forward without substantial change into the Constitution of 1901, as Section 270 of Article XIV.

On February 15, 1976 the Legislature passed an Act (Acts of 1876, page 363) establishing the number of Commissioners as nine; providing for their election at-large on a countywide basis; but prescribing that at least two of the nine must reside within six miles of the courthouse of the county. This Act provided for staggered six year terms with three Commissioners elected every two years.

Upon adoption of a new state Constitution in 1901, the settled policy of taking Mobile County out from under the general scheme of public school legislation and recognizing the existence of a separate school system, separate and a part from the remainder of the state, was, as aforesaid, written into the Constitution of 1901 as Section 270 of Article XIV.

On August 22, 1919 the Legislature passed an Act (Local Acts 1919, page 73) establishing a Board of School Commissioners composed of five members elected by the voters of the county at-large for staggered six year terms with election every two years (thus two Commissioners are elected, then two years later two more Commissioners are elected, then two years later one Commissioner is elected, then the rotation begins again). The same system has endured since that time, and is the system that presently obtains.

In October 1975 the Legislature of Alabama passed an Act providing for a Board of School Commissioners of five members, to be elected one each from five separate districts within the county. The Act provided for staggered four year terms with elections to be held every two years (three Commissioners would be elected, then two years later two Commissioners would be elected, then the rotation begins again). This Act also provided that each member must be a bona fide resident of the district from which he is elected. This Act was declared unconstitutional and void on February 17, 1976 by a Decree of the Circuit Court of Mobile County because of a technical defect, in that there had been a material change between the Act as passed by the Legislature and the notice thereof that had been published in an effort to comply with the requirements of Section 106 of the Constitution of Alabama.

2. Defense: To the extent that this action is based upon 42 U.S.C. Section 1973 the complaint fails to state a claim upon which relief can be granted because the complaint affirmatively shows that no Plaintiff is among those empowered to bring enforcement actions under any provision of the Voting Rights Act of 1965; and because the Defendants are not subject to the provisions of Section 1973.

Theory of the defense: The Defendants are neither a "state" or "political subdivision" of a state. They are not therefore, by the very terms of 42 U.S.C. Section 1973 subject to the provisions of that statute. Further, the Defendants have no capacity to impose any qualification or prerequisite to voting by any citizen in the State of Alabama in connection with the election of the membership of the Board of School Commissioners of Mobile County. Further, the complaint affirmatively shows that none of the Plaintiffs are among those empowered to bring enforcement actions under any provision of the Voting Rights Act of 1965.

Contentions of fact in support of the defense: This is not a defense based upon factual contentions, but upon the provisions of 42 U.S.C. Section 1973 itself and decisions construing that statute.

3. Defense: To the extent that this action is based upon 28 U.S.C. Section 1331 there is a lack of subject matter jurisdiction in this Court since it appears to a legal certainty that the claim of each class member is in reality for less than the requisite jurisdictional amount in controversy.

Theory of the defense: The theory of the defense is adequately stated in the statement of the defense itself.

Contentions of fact in support of this defense: This defense rests factually upon the showing that it appears to a legal certainty from the allegations of the complaint as a whole, as amended, that the claim of each member is in reality for an amount less than the requisite jurisdictional amount in controversy.

4. Defense: To the extent that this action is against the Board of School Commissioners of Mobile County and is based upon 42 U.S.C. Section 1983, the complaint fails to state a claim upon which relief can be granted because the Board of School Commissioners of Mobile County is not a "person" within the intendment of that statute.

Theory of the defense: The theory of the defense is adequately stated in the statement of the defense itself.

Contentions of fact in support of the defense: This defense is made as a matter of law and does not rest upon factual contentions.

5. Defense: The present system of electing members of the Board of School Commissioners of Mobile County does not discriminate against "black residents" of Mobile and Prichard and does not discriminate against the "rural interests" of Mobile County.

Theory of the defense: The theory of this defense is simply that the present system of electing the members of the Board of School Commissioners of Mobile County does not discriminate against the Plaintiffs, because the present system of election was not adopted with a racially discriminatory purpose and because

the indicia of discriminatory effect that would support a finding that there exists a "dilution" of the Plaintiffs' political strength are not present.

Contentions of fact in support of the defense: The constitutional and legislative history of the Board of School Commissioners of Mobile County establishes the fact that the present system was not devised nor adopted for a discriminatory purpose. The evidence will further show that the indicia of dilution referred to in *Zimmer* v. *McKeithen,* are not present. There is no lack of access to such process of slating candidates as may exist in Mobile County; there is no unresponsiveness to particularized interests of the Plaintiffs; there is no tenuous state policy underlying a preference for multi-member or at-large districting; and the Plaintiffs are not precluded from effective participation in the election system as a consequence of any occurrence of past discrimination.

6. Defense: The Plaintiffs do not constitute an identifiable segment of the population.

Theory of the defense: As an initial step the Plaintiffs have the burden of proving that they constitute under the present facts an identifiable class for Fourteenth Amendment purposes. Merely because the Plaintiffs are black does not constitute them as an identifiable class.

Contentions of fact in support of the defense: This is primarily a legal defense based upon Court decisions; from the factual standpoint however, it is the Defendants' position that the facts simply do not support the contention that the Plaintiffs are an identifiable segment of the population.

7. Defense: There is no constitutional right to a black electorial district.

Theory of the defense: No one has a constitutional right to a politically safe black district.

Contentions of fact in support of the defense: This defense does not rest upon fact but is a legal defense dependent upon judicial decisions.

DEFENDANTS' STATEMENT OF CONTESTED FACTS

It is contested that this action should proceed as a class action and it is contested that the Plaintiffs comprise an identifiable segment of the population of Mobile County. It is contested that the Plaintiffs are being or will be adversely effected by the present system of election or that the Plaintiffs are deprived of the equal protections of the laws because of the present system of election. It is contested that the Defendants have acted or refused to take any action on grounds generally applicable to any class of persons. It is contested that the Plaintiffs are now suffering or will continue to suffer irreparable injury or injury of any sort from the present system of election. It is contested that the present system of election was adopted for a discriminatory purpose. It is contested that there is a constitutional right to politically safe black electoral districts. It is contested that the factors or indicia of dilution, the presence of which are required in order to warrant disturbing the present electoral system, are present in Mobile County in connection with the manner of election of the members of the Board of School Commissioners of Mobile County. It is contested that the Plaintiffs lack access to the process of "slating" candidates, or that there is any formal process of "slating". It is contested that there is unresponsiveness to the particularized interest of the Plaintiffs. It is contested that there is a tenuous state policy underlying a preference for multi-member or at-large districting. It is contested that the existence of past discrimination precludes effective participation in the present system by the Plaintiffs.

DEFENDANTS' STATEMENT OF CONTESTED LEGAL ISSUES

It is the contention of the Defendants that multi-member district systems of election are not per se unconstitutional, and that the burden of proof of unconstitutionality is upon the Plaintiffs.

It is the contention of the Defendants that before the Court can consider granting relief it must first have found a constitutional violation.

It is the contention of the Defendants that the controlling legal principle is that arising in *Washington* v. *Davis,* —— U.S.L.W. 4789 (U.S. June 7, 1976) and that therefore before this Court can declare the present system of election to be unconstitutional by reason of its being "racially discriminatory" it must first be proven that the statute providing for the present system, when enacted, was enacted for a racially discriminatory purpose. Further, and in addition, the present system of election cannot be declared unconstitutional unless it is factually proven that the indicia of discriminatory effect or the "panoply of factors" referred to in *Zimmer* v. *McKeithen* are found to be present in Mobile County with regard to the present system of election of the Board of School Commissioners of Mobile County.

It is the further contention of the Defendants that the Plaintiffs are not entitled to relief unless it is proven that they are an identifiable segment of the population, dissimilar from other segments of the population; that the Plaintiffs have no constitutional right to a politically safe black electoral district; and that the mere showing of adverse impact upon the Plaintiff is not sufficient to carry the burden of proof of unconstitutionality.

UNCONTESTED FACTS

Plaintiffs are all black citizens of Mobile County, Alabama and are each over the age of twenty-one years, and reside where it is stated in the complaint they reside. John L. Moore is the Probate Judge of Mobile County, John E. Mandeville is the Circuit Clerk of Mobile County, Thomas J. Purvis is the Sheriff of Mobile County and these three officers serve as the appointing board for election officials and as the board of election supervisors to certify election results in Mobile County. Howard Yeager and Bay Haas are members of the Mobile County

Commission, Robert R. Williams, Dan C. Alexander, Jr., Norman J. Berger, Ruth F. Drago, and Homer L. Sessions are the present members of the Board of School Commissioners of Mobile County.

The Board of School Commissioners of Mobile County is composed of five members elected at-large for staggered six-year terms. These are partisan elections with majority vote-runoff requirements for the party primaries. The nominee of each party then runs in a general election. There are no residency requirements and the candidates run for numbered positions.

At least four black candidates have sought election to the school board, Dr. E. B. Goode in 1962, Dr. W. L. Russell, in 1966, Ms. Jackie Jacobs in 1970 and Mrs. Lonia Gill in 1974.

Mobile County has a total population of 317,308 of whom 32% or 102,383, are black.

PLAINTIFF'S STATEMENT OF CONTESTED FACTS

1. Whether, due primarily to segregated housing patterns, certain residential areas of Mobile County are racially identifiable.

2. Whether there has been any protracted history of racial discrimination in voting in Mobile County.

3. Whether there has been and whether there is now a high racial polarization of the vote when issues or candidates have an identifiable racial appeal.

4. Whether the present system of electing members of the Board of School Commissioners of Mobile County dilutes the voting strength of black citizens of Mobile County.

5. Whether local government officials, including the Mobile County School Board have been responsive to the needs and petitions of the black community.

6. Whether and to what extent there is a state interest in the maintenance of the present at-large election system for the Mobile County School Board.

7. Whether the creation of five or more single-member districts would enhance black access to the political process.

8. Whether the candidate selection process is open equally to black citizens.

PLAINTIFF'S STATEMENT OF CONTESTED LEGAL ISSUES

1. Whether the present at-large system for electing members to the Mobile County School Board unconstitutionally dilutes the voting strength of the black citizens of Mobile County, thereby abridging their rights to vote and participate in the political process relating to the selection of school board members guaranteed them by the First, Thirteenth, Fourteenth and Fifteenth Amendments to the United States Constitution, in violation of 42 U.S.C. §§ 1973 and 1983.

2. Whether the creation of an election system utilizing single-member districts is an appropriate remedy if the present at-large system is determined to be constitutionally defective.

3. Whether this Court has jurisdiction of this action under the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973.

LARRY MENEFEE
Attorney for Plaintiffs

ABRAM L. PHILIPS
Attorney for Defendants
School Board and Commissioners

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ALABAMA
213 U. S. COURT HOUSE & CUSTOM HOUSE
MOBILE, ALABAMA 36602

DATE: July 30, 1976

To: Gregory B. Stein and J. U. Blacksher
Edward Still, 601 Title Bldg., 2030 3rd Ave., N., Birmingham, Alabama
Jack Greenberg, James M. Nabrit, III & Charles E. Williams, III, 2030, 10 Columbus Circle, New York N. Y., 10019
James C. Wood
Ralph Kennamer
Abe Phillips

RE: CIVIL ACTION NO. 75-298 P

LEILA G. BROWN, ET AL
vs.
JOHN L. MOORE, ETC., ET AL

You are advised that on the 30 day of July 1976 the following action was taken in the above-entitled case by Judge PITTMAN:

Motion to strike from answer, filed by the plaintiffs July 29, 1976 GRANTED. Part concerning pages 2-3 of defendants' second motion for continuance and pages 3-4 of defendants' response to motion for default judgment is MOOT.

WILLIAM J. O'CONNOR, CLERK

BY:

Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
AUG. 9, 1976
WILLIAM J. O'CONNOR, CLERK

LEILA G. BROWN, et al.,
Plaintiffs,
J. U. Blacksher
Larry Menefee

v. CIVIL ACTION NO. 75-298-P

JOHN L. MOORE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PROBATE JUDGE OF MOBILE COUNTY, ALA., et al.,
Defendants.
James C. Wood
Ralph Kennamer
A. L. Philips, Jr.

ORDER ON PRETRIAL HEARING

This cause coming on to be heard on a regular pretrial hearing on the 2nd day of August, 1976, and all parties being present in person or by counsel, the following action was thereupon taken:

1. The following pleadings and amendments were allowed:

Complaint and answer as last amended.

2. It was agreed by all of the parties that the following are all of the issues in controversy in this cause:

PLAINTIFFS

See response to preliminary pretrial order filed July 30, 1976.

DEFENDANTS

See response supra.

3. The following facts are established by admissions in the pleadings or by stipulations of counsel at the pretrial conference:

See response supra.

4. The contested issues of fact are:

See response supra.

4b. The contested legal issues are:

See response supra.

5. It is ORDERED: This case is set for trial September 9, 1976.

On or before August 19, 1976:

If the paragraph is marked (X)

(X) (a) That each party in this case furnish counsel for the opposing party, for copying and inspection, all documents and exhibits that are to be used in the trial of this case, including those requested by subpoena duces tecum.

( ) (b) That the parties exchange the names of witnesses known or which reasonably should be known, this restriction not applying to rebuttal witnesses, the necessity of whose testimony reasonably cannot be anticipated before the time of trial.

(X) (c) All discovery is to have been accomplished. Experts may be deposed on or before 9/1/76 providing trial is not delayed.

(X) (d) That the parties file briefs with the Clerk of this Court, on or before 9/2/76.

(X) (e) The authenticity of any documents or exhibits is admitted unless it is specifically called to the attention of the Court and opposing counsel on or before August 25, 1976.

( ) (f) If the case is to be tried to a jury, it is directed that requests for instructions be submitted to the Court at the commencement of the case, subject to the right of counsel to supplement such requests during the course of the trial on matters that cannot reasonably be anticipated.

(X) (g) The qualification of any expert whose testimony is offered by deposition is admitted, unless it is specifically called to the Court's attention and opposing counsel on or before August 25, 1976.

( ) (h) Doctor, medical and hospital bills are admitted as reasonable unless specific objection is made to the Court and opposing counsel.

( ) (i) All parties seeking special damages are to furnish the other parties a list of their special damages.

( ) (j) All parties seeking damages are to furnish the other parties income tax returns for 19 , 19 and 19 .

(X) (k) If there are expert witnesses, the attorney must file, and submit to opposing counsel, a reasonably brief narrative form of their qualifications which are admitted unless called to the opposing counsel and court's attention on or before August 25, 1976.

(X) (l) The response to the preliminary pretrial order is incorporated and made a part of this order.

(X) (m) Counsel for the respective parties will file with the court, and opposing counsel, suggested Findings of Fact and Conclusions of Law, and a Judgment and Order, all appropriately designated, on or before Septem-

ber 2, 1976. The Findings of Fact and Conclusions of Law are to be in a form sufficient, in the opinion of counsel, to sustain his position on appeal.

6. The probable length of the trial of this case will be 5-6 days.

7. The prospects of settlement of this case are none.

It is further ORDERED by the Court that all of the above-named allowances and agreements be and the same are hereby binding upon all parties in the above-styled cause, unless this order be hereafter modified by order of the Court.

DONE this the 2nd day of August, 1976, at Mobile, Alabama.

Parties calling experts are to submit a statement of the subject matter on which the experts are expected to testify and the substance of the facts and opinions to which the experts are expected to testify and a summary of the grounds for each opinion, on or before August 19, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

Each counsel, upon placing a witness in the witness box for examination, shall read or state a summary of all background information concerning said witness, such as name, age, address, marital status, education qualifications, professional qualifications, and any other background information desired, and shall then inquire of the witness if such statements are correct. Thereafter, the second question to the witness shall be a question related to the merits of the case.

All parties are to submit to the court one week before trial a proposed reapportionment plan.

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
SEP. 2, 1976
WILLIAM J. O'CONNOR, CLERK

MOTION TO SEVER AND TO DISMISS OR CONTINUE

Comes now the Defendant, Board of School Commissioners of Mobile County and respectfully moves the Court as follows:

1. To sever the cause of action stated against the Board of School Commissioners of Mobile County from the cause of action stated against the Mobile County Commission and the other Defendants herein.

2. To dismiss the cause of action against the Board of School Commissioners of Mobile County, or in the alternative, to continue the cause of action against the Board of School Commissioners of Mobile County until a later time.

In support of this motion these Defendants would respectfully show unto the Court as follows:

1. The choice of the form of governance of the Public School Systems of this country is a political issue committed under our federal Constitution to the states for resolution and, in the case of Mobile County, the issue has heretofore been resolved by the people of Alabama through their Constitution and by the Legislature of the State of Alabama through the enactment of statutes, providing for the form of governance of the Mobile County Public School System that now exists. All aspects of the governance and operation of the Mobile County Public School System are subject to determination by the Legislature of the State of Alabama. In the exercise of its discretion, the Legislature has heretofore provided that the School System shall be governed by a Board of five persons and has provided the method to be used in electing

them. Under our federal constitutional system, the determination of such matters is absolutely committed to state government for resolution.

2. To the extent that it relates to these Defendants, this cause is predicated upon allegations that the present system provided by the Legislature of the State of Alabama through the laws of Alabama, for the election of the membership of the Mobile County School Board, is unconstitutional because it discriminates against certain citizens (i.e., black citizens and those persons who live in the rural areas of the County) in violation of the United States Constitution. This present system provides for a Board of five members, each elected from the County at-large by the vote of the qualified electors of the County at-large. This system exists in its present form by virtue of Acts previously passed by the State Legislature, and it can be changed by either an amendment to the Constitution of the State of Alabama or by other Acts that may hereafter be passed by the Legislature.

3. Subsequent to the filing of this cause in this Court, the State Legislature passed an Act (Act No. 1150 of the 1975 Regular Sessions) reapportioning the School Board into five single member districts. This Act was introduced into the Legislature by Representative Cain Kennedy, a black Legislator who was a member of the law firm representing the Plaintiffs in this cause when this cause was filed. Passage of this Act by the legislature was procured by Mr. Kennedy with the cooperation of these Defendants, who, just as Mr. Kennedy, were satisfied that a Board composed of five members elected from single member districts would satisfy every constitutional requirement and would provide for equitable representation on the Board for the black citizens of Mobile County and the rural area citizens of Mobile County, in whose names and in whose behalf this action has been brought.

4. Following the passage of Act No. 1150 the Plaintiffs themselves then moved this Court to dismiss these

Defendants from this cause, and in essence to dismiss the School Board portion of the lawsuit, apparently because said Act 1150 provided a constitutional system of electing the School Board. These Defendants made no objection, and this Court granted the motion and dismissed these Defendants from the case.

5. Thereafter, said Act 1150 was discovered to be fatally defective and was declared void by the Circuit Court of Mobile County because of technical deficiencies in the enactment thereof by the State Legislature in a manner contrary to the Alabama Constitution. When this occurred, upon motion of the Plaintiffs made ex-parte and considered by this Court without these Defendants having an opportunity to be heard the Court reinstated these Defendants as Defendants in this cause.

6. Subsequent to the action of the Circuit Court of Mobile County declaring said Act 1150 to be void these Defendants expected the Plaintiffs, acting through Mr. Kennedy, to again procure passage of another Act by the Legislature providing for a constitutionally acceptable system of electing the School Board just as did said Act 1150. As time moved on and no such action was forthcoming these Defendants themselves procured the introduction into the Legislature of a Bill essentially identical to Act 1150 that would establish for the governance of the Mobile County Public School System a five member Board composed of five single member districts identical to those provided by Act 1150 previously introduced by Mr. Kennedy. This Bill was designated as House Bill 1060, Regular Session 1976. This Bill was introduced into the Alabama Legisture by Representative Nat Sonnier at the request of these Defendants, and these Defendants then exerted strong efforts to procure passage of the Bill into law.

7. Despite the efforts of these Defendants the Bill was not passed into law, but was blocked by the negative votes of three members of the Mobile County Legislative Delegation and the overt efforts of two of them to defeat the Bill. But for these negative efforts and votes the Bill would have been passed into law.

8. The three members of the Mobile County Legislative Delegation who prevented passage of the Bill are Representative Douglas Johnstone, Representative Gary Cooper, and Representative Cain Kennedy. Mr. Johnstone is white, Mr. Cooper and Mr. Kennedy are black.

9. These Defendants are informed and believe and upon such information and belief would aver that Mr. Johnstone expressed objection to the Bill based upon his evaluation that the Bill would not be constitutionally sound under the one man-one vote principle because of a deviation in the population in one of the five shcool commissioner districts that would be created by the Bill.

10. These Defendants are informed and believe and upon such information and belief would aver that Mr. Cooper and Mr. Kennedy blocked passage of the Bill upon request made to them by the leadership of and the spokesman for the class action Plaintiffs in this cause.

11. But for the opposition of Representives Johnstone, Cooper and Kennedy, the Bill would have passed the Alabama Legislature and would have reapportioned the Board of School Commissioners of Mobile County into five single member districts providing equitable representation for the black citizens of Mobile County and the rural interests of Mobile County.

12. Taking into account Representative Johnstone's concern for the deviation in size of the one of the districts these Defendants are prepared to introduce into the Legislature at the earliest opportunity and to procure passage of another Bill essentially identical to Act 1150 originally introduced by Mr. Kennedy and House Bill 1060 previously introduced by Mr. Sonnier at the request of these Defendants with a slight adjustment that will eliminate the deviation in size about which Mr. Johnstone expressed concern.

13. If the Court will dismiss these Defendants from this cause or continue this cause as it relates to these Defendants, thereby removing the coercive effect of federal intervention into the legislative process, it can be anticipated that Mr. Kennedy and Mr. Cooper will refrain from exerting their efforts to block passage of the Bill and the Board of School Commissioners of Mobile County can be reapportioned into five single member districts meeting all constitutional standards by the normal legislative process of the State of Alabama, which is, under our federal constitutional system, the appropriate way for such action to take place.

WHEREFORE, these Defendants respectfully request that the cause of action against them be severed from the cause of action against the other Defendants; and that the cause of action against them be either dismissed or continued at the discretion of the Court.

These Defendants further respectfully request that they be heard upon this motion at the convenience of the Court; and that the Court forthwith cause the issuance of subpenas to Representative Douglas Johnstone, Representative Cain Kennedy, Representative Gary Cooper, Representative Nat Sonnier, and to each and every other member of the Mobile County Legislative Delegation, whose names will be supplied to the Court, to appear before the Court for the purpose of giving testimony with regard to the matters and things concerned in this motion.

Respectfully submitted this day of September, 1976.

PILLANS, REAMS, TAPPAN,
WOOD, ROBERTS & VOLLMER

By _____
Abe Philips, Attorneys for the
Board of School Commissioners of
Mobile County
P. O. Box 8158
Mobile. Alabama 36608

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

LEILA G. BROWN, et al.,
Plaintiffs,
v.
JOHN L. MOORE, et al.,
Defendants.

CIVIL ACTION
NO. 75-298-P

ORDER ON DEFENDANT BOARD OF SCHOOL COMMISSIONERS' MOTION TO SEVER AND DISMISS OR CONTINUE

The defendant's motion to sever is hereby DENIED.

The defendant's motion to dismiss is hereby DENIED.

The defendant's motion to continue in order to give the Legislature of the State of Alabama on apportunity to act on a proposed redistricting is hereby DENIED.

The complaint was filed June 9, 1975. The defendant's attention is directed to a conderence with the attorneys for the Board of School Commissioners, the County Commissioners, and the City Commission of the City of Mobile, in open court on July 14, 1976. The long delay of the defendant in answering the complaint making the School Board, et al., defendants a second time, was called to the attention of the attorney for the defendant School Board.

It was at the request of the defendant School Board that a continuance was granted of the trial of their case at that time, although there were mitigating court scheduling problems.

It was common knowledge at that time that a proposed redistricting plan had been passed at a previous session of the Legislature but later declared unconstitutional. It was common knowledge there was pending in the State Legislature which

was then in session a redistricting plan. The court specifically advised counsel for all the parties that the court would not be disposed to further delay the trial or decision after the September, 1976, setting, and if any, or all of the defendants, anticipated seeking changes in the makeup or districting of their respective Commissions or Boards, they should take action while the Legislature was then in session. Due to the age of this case, and the Legislature having had two opportunities to act during its pendency, additional delays are not justified.

Done, this the 7th day of September, 1976.

VIRGIL PITTMAN /s/

UNITED STATES
DISTRICT JUDGE

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
7TH DAY OF SEPTEMBER 1976
MINUTE ENTRY NO. 41619
BY_____
DEPUTY CLERK

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
FEB. 15, 1977
WILLIAM J. O'CONNOR, CLERK

NOTICE OF APPEAL

Come now ROBERT R. WILLIAMS, DAN C. ALEXANDER, JR., NORMAN J. BERGER, RUTH F. DRAGO, HOMER L. SESSIONS, individually and in their official capacity as School Commissioners of Mobile County, Alabama, Defendants in the above styled cause, and file this, their notice of appeal of this Honorable Court's Order dated January 21, 1977.

SINTZ, PIKE, CAMPBELL
& DUKE
Attorneys for Defendants
800 Downtowner Boulevard
Mobile, Alabama 36609

ROBERT C. CAMPBELL, III

DANIEL A. PIKE

FRANK G. TAYLOR

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

U.S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE
FEB. 28, 1977
WILLIAM J. O'CONNOR, CLERK

NOTICE OF CROSS-APPEAL

Notice is hereby given that Leila G. Brown, Mary Louise Griffin Cooley, Joannie Allen Dumas, Elmer Jo Daily Edwards, Rose Lee Harris, Hazel C. Hill, Jeff Kimble, Frances J. Knight, John W. Leggett, Janice M. McAuthor, Appellants above named, hereby cross-appeal to the United States Court of Appeals for the Fifth Circuit from the Judgment entered in this action on January 18, 1977, but solely to the extent that said Judgment and Injunction fails to order new elections of all five (5) School Commissioners in 1978, rather than the staggered elections provided in 1978, 1980 and 1982 which allow incumbent School Commissioners, or some of them, to complete their current terms.

Date: February 28, 1977.

CRAWFORD, BLACKSHER,
FIGURES & BROWN
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BY: _____
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Attorneys for Plaintiffs-
Cross Appellants
Leila G. Brown, et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LILA G. BROWN, et al,	:	
Plaintiffs.	:	
vs.	:	CIVIL ACTION NO. 75-298-P
JOHN L. MOORE, et al,	:	
Defendants.	:	

THIS CAUSE COMING ON TO BE HEARD before The Honorable Virgil Pittman, United States District Judge for the Southern District of Alabama, on September 9, 1976, and succeeding days thereafter, commencing at approximately 9:00 o'clock A.M., each day.

APPEARANCES

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Reporter, Charles A. Howard

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MORNING SESSION

September 9, 1976 9:30 O'CLOCK A. M.

THE COURT: Gentlemen, this case of Lila G. Brown and John L. Moore, and others, what says the plaintiff?

MR. BLACKSHER: Plaintiff is ready.

THE COURT: What says the Defendant?

MR. PHILIPS: We have some motions we need to present to the Court.

THE COURT: All right.

MR. PHILIPS: Should we present them now, Your Honor?

THE COURT: Yes. You said you had more than one? Do you have another one?

MR. PHILIPS: Yes, Your Honor. This is a motion to reconsider the School Board's prior motion for severence and dismissal, or continuance. The prior motion, Your Honor, has already been ruled upon, denying the motion to sever, continue or dismiss.

My clients have instructed me to file a motion to reconsider and to ask Your Honor to reconsider

that action on that motion, and, particularly, to reconsider that aspect of the motion wherein we asked to be heard before the Court on all argument on the motion wherein we asked for the opportunity to present testimony to the Court bearing on the matters and things in the motion which, by Your Honor's ruling denying the motion, we have not had an opportunity to do. My client asks me to prepare and file a motion to reconsider.

THE COURT: Do you have anything further to set out than that which you set out in your motion?

MR. PHILIPS: Your Honor, we need to develop those materials by testimony.

THE COURT: How much time do you anticipate it will take?

MR. PHILIPS: Your Honor, I would aniticipate, probably, an hour.

THE COURT: It is difficult to see where it would take that long. I will give you an opportunity to argue it. What testimony do you expect to offer? I will give you an opportunity to make a showing.

MR. PHILIPS: Your Honor, I have the testimony of - - let's see, I believe I have subpoenaed five or six witnesses to appear here this morning for the purpose of testimony with regard to this motion.

THE COURT: Well, I am asking you to make

a showing as to what they would testify to.

MR. PHILIPS: I have three of the witnesses here now, and there are two others that have been subpoenaed that are not here yet. The showing of the testimony that we would intend to produce with reference to the motion is simply this, Your Honor, that the School Board, itself, has had no objection to reapportionment or redistricting of the School Board, that the School Board itself, when an act was introduced into the Legislature, supported the act before the Legislature, in an effort to procure passage of the act. The act was ultimately passed, and the act was introduced by Rep. Cain Kennedy of Mobile County. The act passed to redistrict the Board into a Board of five single member districts.

That act was then discovered to be unconstitutional, or invalid, simply because it was a local act, and it had not been properly advertised so it could properly be passed as a local act and was, therefore, void, under the Alabama Constitution.

The Board became concerned when that point was raised and submitted it to a Court for declaratory judgment, to determine whether or not, in fact, the act was valid or void, and the Court determined that the act was void by having not met the requirements of the Alabama

Constitution. Therefore, that act was voided by the Court by the order on the declaratory judgment.

Subsequently, the School Board then was readmitted as a defendant into this case on the plaintiff's motion. In the meantime, the School Board had anticipated the passage of another act in the Legislature to redistrict the School Board. The School Board, rightly or wrongly, had anticipated that Mr. Kennedy would reintroduce his act in a proper form that would meet the standards of the Constitution of Alabama, and gain passage. This did not occur. So, the School Board, itself, undertook to procure, or introduce into Legislature, another act that would distric the School Board into five single member districts.

In doing so, procured another representative of Mobile County. I believe this was Rep. Nat Sonier, to prepare and introduce the bill in the Legislature to accomplish the redistricting into five single member districts. These districts were set up on the basis of combinations of the House of Representatives Electoral Districts for Mobile County.

The original bill, which was enacted, Kennedy's original bill, combined the House of Representative districts into five School Board districts. The bill that was introduced by Mr. Sonier was constructed in the same

manner. It created five districts by the same combination of House of Representative districts so that there would be five single member districts.

The bill that was introduced by Mr. Sonier ran into opposition in the Legislature from three Mobile County legislators. As I understand it, the three who opposed passage of the bill was Rep. Cain Kennedy, Rep. Gary Cooper and Rep. Douglas Johnstone. My clients are informed, as a matter of fact, one of the members of the Board itself is an individual in personal discussions with Representatives in the Legislature when they were there lobbying in an effort to procure passage of the bill, and was informed that Mr. Kennedy and Mr. Cooper and Mr. - - Mr. Kennedy, by the way, was a member of the firm of the plaintiff in this case at the time this action was filed. My clients were informed that Mr. Kennedy and Mr. Cooper opposed passage of the bill on suggestion from the plaintiffs.

Our position is, bearing in mind that this is a class action lawsuit - - when I say on the suggestion of the plaintiff, I don't mean under the suggestions of plaintiff's counsel. It may have been, or may not have been. I make no contention in that respect.

Counsel will have to speak for themselves in that respect, but that Mr. Kennedy and Mr. Cooper voted

against the bill and effectively blocked passage of the bill upon request of the plaintiffs in the class action lawsuit that is now before the Court.

It is the contention of my clients that, based on that set of facts, these plaintiffs do not come to this Court with clean hands, that having blocked the passage themselves, of an act that would have redistricted the School Board in the very manner that the Court now has under consideration, that that blockage was solely on the basis of action taken by these individuals at the request of the plaintiffs themselves and that they effectively prevented the Legislature of the State of Alabama from undertaking action which is properly, I think we all agree, properly the function of the State Legislature; not to say that this Court does not have the power to act in the absence of action by the Legislature, but I think it cannot be contended that that function is first and foremost the function of the State Legislature. The State Legislature was in the process of acting, and we would intend to show to the Court that, but for the efforts to block passage of this bill by those people who acted on behalf of, or at the request of the plaintiffs, the Legislature would have acted, and would have enacted a redistricting plan of five single member districts that would have met all constitutional tests and requirements.

It is for that reason that we think our clients are entitled to have their motion to sever, and we don't intend to suggest to the Court that we want to hold up the entire lawsuit, since it involves other defendants who are not similarly situated with regard to the matters that I have spoken of this morning.

We did not ask the Court to continue the entire lawsuit, but that was the reason for asking for the severence. We think our clients, under these circumstances, should have an opportunity to pursue the efforts that they have been pursuing to procure the legislature to do that which is the function of the Legislature to determine and to set the manner of governments of the Mobile Public School System and the Legislature, having evidenced it's intent to do it by five single member districts.

We think the Legislature should have the opportunity to finish that task, and we think the School Board or the Legislature is entitled to have that opportunity. That is the reason we asked for the continuance.

We further make the showing, on behalf of the School Board, that it is the School Board's intent, if the case is continued in such a manner as to give the Legislature the opportunity to do so, that they would pursue and procure passage of a bill, as they have been

attempting to do to redistrict the Board into five single member districts similar, if not identical, to those districts that were a part of the original bill and introduced by Mr. Kennedy, which is the combination of the representative, or House of Representatives districts that are already in existence by virtue of reapportionment of the legislature, setting it up in a manner that would produce five single member districts that would meet every Constitutional test.

Part of the motion, or part of the pre-trial order, or proposed pre-trial order that has been filed by the plaintiffs, include the prayer for award of attorneys' fees. We think it is utterly incongruous, for example, the School Board would be forced to continue to trial and, if unsuccessful, forced to pay the plaintiffs' attorneys' fees, which, in fact, the School Board has attempted to do, and would have done, but for the efforts of attorneys - - excuse me, but for the efforts of the legislature to block the passage of the bill that would have accomplished the redistricting that the Court would ultimately require if, indeed, it finds that there should be a change.

For all of these reasons, we feel it is an equitable necessity that this matter be continued, insofar as it relates to the School Board, to give them an opportunity to complete the redistricting by the Legislature. This is basically the showing we would intend

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to make, Your Honor.

THE COURT: Would the plaintiffs offer anything in opposition to that?

MR. STILL: Your Honor, we would. In opposition, we would show that there was no procurement of any action, or non-action, on the part of the plaintiffs.

We would further show that the only contact that Mr. Kennedy had with this lawsuit while he was a member of the law firm in which Mr. Blacksher and Mr. Menefee are members, was a casual one. He was never counsel of record, never prepared any pleadings, never really brought into the discussions of the case.

We further show, after Mr. Kennedyleft the law firm of Crawford, Blacksher, Figures and Brown, he did make a contact with the plaintiff's counsel during the trial of Bolden vs. Mobile, after the Sonier Bill was introduced, and inquired of us what our position on that bill was. We would show that counsel for plaintiffs, at that time, informed him that it was our opinion that the bill was unconstitutional under the Federal Constitution, because it did not provide for equal districts, because one of the districts would have approximately 53,000 people in it, while four of the districts would have 66,000 people, each, in them, and we felt that was beyond the pale of the standards.

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We further pointed out to him that it was quite possible that this Bill would also, the Sonier Bill, would also be declared unconstitutional under the Alabama Constitution provisions, against the passage of local acts without advertisement, because the Bill had not been advertised, and was being disguised as a General Bill of local application, but, in fact, met what the Alabama Supreme Court calls a double classification test, and for that reason - - we made no effort to procure his action, or inaction, on the Bill, but simply informed him of what our position on the Bill was.

We would further point out to the Court that there has been no offer to show, by the defendants, that the Senate would have passed the Bill, and we would finally show, if necessary, that if the Bill had been passed, the plaintiffs' counsel were prepared to introduce a motion to attack that new act, the Sonier Bill, in this Court, as a part of this action. That would be all the evidence we would present on the motion, Your Honor.

THE COURT: Mr. Blacksher, is Mr. Kennedy still a member of your law firm?

MR. BLACKSHER: No, sir. He left, I think, in October of 1975.

THE COURT: If you should be successful in this lawsuit, would he participate in the fee in any way?

MR. BLACKSHER: In no way.

THE COURT: You have no agreement in that respect?

MR. BLACKSHER: That is correct. We have completely severed all financial ties at the time the partnership was dissolved. I would like to add to Mr. Still's proffer of what our proof would be, just a brief comment on the procedural posture that this motion brings to us.

I want, first of all, to point out, Your Honor, that the motion really contains, it appears, two parts. One, it appears that the School Commissioners are admitting liability. They say they do not object to re-districting the School Board. Of course, the threshold problem for the plaintiffs in this case is to prove that the existing system is unconstitutional, and that is what we intend to do, and develop most of our efforts toward doing, and have prepared to do today, and for some time. I am not sure whether they are saying that they admit whether the present system is unconstitutional and, therefore, we are fussing about what is the appropriate remedy. Either way, if we have to wait until next year to see what the Legislature does before we have a contest about liability, then our clients suffer severe prejudice. I think Your Honor would see that we have to go through the same thing

all over again.

If we are talking about a remedy, then we get into the questions and the issues that Mr. Still addressed; that is, whether or not the Bill that was introduced by Mr. Sonier was an adequate remedy, whether this Court could approve it under constitutional standards, or whether some other remedy should be provided. Regardless of that, it serves no purpose to continue this action to see what the Alabama Legislature is going to do in 1977, when the Alabama Legislature is obviously going to act independent of this Court, anyway, even if this Court found that the present system was unconstitutional and order a new system as a remedy pursuant to the plaintiffs' prayer, I am confident that the Alabama Legislature has it within its' power to propose another plan which we would then have to agree, or not agree, with, and bring to this court, and I am sure that is going to continue indefinitely into the future. I don't see how the defendants are served by a continuance of this trial, because they can still have whatever input they claim to have with the Mobile County Legislative Delegation for purposes of modifying whatever plan might come out of this court action.

THE COURT: Any reply?

MR. PHILIPS: Yes. I would like to respond briefly. I need to make it clear that in the position

the School Board is taking, they are not undertaking to confess to the Court, or to take the position that the present plan is unconstitutional.

They are taking the position, as they have taken, that whether it is unconstitutional or not, the basic drive, and the basic thrust of the lawsuit is to place a black, or one or more black persons, on the School Board, and to accomplish that through redistricting, if it can be proven that it is unconstitutional.

The Board's feeling that whether the present method is constitutional, or unconstitutional, they have no objection to redistricting. That is the position they are taking, and that is the reason they supported the original Kennedy Bill in the Legislature to redistrict into five single districts.

It is true, in fact, that the Kennedy Bill, as introduced, probably contained a population disparity in the districts, as Mr. Still described it. There was one district that was underpopulated by comparison to the others. We referred to that in the original motion, as Your Honor will recall.

We pointed out that there was that disparity. We pointed out the fact that when the School Board then procured introduction by Rep. Sonier of the second bill, that that disparity carried forward simply

because they proposed the same districts that Mr. Kennedy had originally proposed, but as I pointed out in the motion, the School Board has, in working with a statistical expert in preparation of the districts, found that that disparity in the population in the one district, can be very simply cured by the movement of two wards, I believe it is, into that district, maintaining the territorial integrity of the wards into a whole, not moving wards piecemeal, but moving two wards that would cure the disparity in population, and the Board is prepared to go forward and procure the passage, in the Legislature, of redistricting that would include the movements of these two wards to cure that disparity, and we referred, in the motion, to the fact that objections had been raised in the Legislature to that disparity, and I believe we attributed that to Rep. Douglas Johnstone. I am not sure if that is accurate, but, in any event, objection was made to that disparity.

The Board is prepared to proceed with a Bill that will cure that disparity. The question of whether any purpose would be served by a continuance. I think the purpose to be served should be entirely obvious. It goes back to the simple fact, again, that it is the function of the State Legislature to do this, and the State Legislature has not exhibited an unwillingness to do it, but, in fact, has exhibited a willingness to do it. In fact, has done it

by the passage of the Kennedy bill, and would have done it again by the passage of the Sonier bill, but for the efforts of Mr. Kennedy and Mr. Cooper to block the Bill.

The question of whether or not it would have passed, or been blocked in the Senate, counsel indicates that they were prepared to have it blocked in the Senate. Well, that speaks for itself. I don't think I need to add anything to that.

Counsel disclaims any effort to block it in the House, and we made no accusation that Counsel did want to block it in the House, but Counsel has indicated, himself, that they were prepared to block it in the Senate, because, as I understand it, because of the disparity.

MR. BLACKSHER: Your Honor, that is not what Mr. Still said.

THE COURT: Go ahead, gentlemen. Let's don't get into a personal thing. I heard you both, all three of you.

MR. PHILIPS: So, those are the points, Your Honor, I felt I needed to respond to. I think the Board is entitled to have the opportunity to have the Legislature do this. If this Court should proceed with these defendants and the other defendants, and an Order comes out of this Court, or a decree comes out of this Court requiring redistricting, or reapportionment, or some

variation thereof, which requires action upon the part of the Legislature, or which requires an election. It is not likely that the Court would require an election before 1978, under the practicalities of the situation. So, activity on the part of the State Legislature to redistrict in the 1977 Session, would be in ample time to dovetail into the legislative system and scheduling of elections.

We are not suggesting delay, or seeking delay, Your Honor, for the sake of delay. We are seeking a continuance and a dismissal, although I am not certain that the Court will seriously entertain the request for dismissal, although I think there is some factual basis for it. We are seeking a continuance, because the Board does not feel like it should be put to the task of a long and expensive trial, and then the ultimate possibility of payment of plaintiffs' attorneys' fees, when the Board is prepared to go forward, and has no objection to going forward, and accomplishing that which the lawsuit is designed to accomplish to begin with.

THE COURT: In our July conference, I think it was clear from the statements that I had made, that the Court, too, preferred for the Legislature to act, if it would. I called all the attorneys' attentions, at that time, that the Legislature was in session, and there was a pending bill, and that if action could be taken, it

should be taken, and the Court would not look with favor upon a continuance at the setting of this case.

This case was filed in June of 1975. This is August of 1976. The median time for trying and disposing of cases in this court runs from five to eight months, and this, somehow now, is fifteen months, or more. So, the Court, in this case, has certainly proceeded with deliberate speed, if not more deliberateness than speed.

The Legislature has had two opportunities, and the Court has no assurance that if they passed a Bill, that it would be constitutional, and then we would be stuck with a hearing. I would much prefer that these matters be served in the forums of the State. I think I would be derelict in my duty to all of the people, if I did not handle their litigation with some expedition, and I say this, as not preemptory expeditious - - considering the age of this case, and the seriousness of the problems involved, and the median case disposition of the other work of the court. I will take your proffer as to what your witnesses will testify to.

I might say, your proffer was covered substantially in your six page motion for continuance, and I don't really see anything in addition being added to it. I did want to give you an opportunity, orally, to make your motion before - - to make a proffer of what your evidence

would be. Considering the fact that your evidence would be such as you say it would be, and considering the fact that the plaintiffs' evidence would be as such, it is my judgment that this case should proceed to trial, and I will deny your motion.

MR. PHILIPS: Your Honor, I have some witnesses that were subpoenaed to testify, and I think they can be released?

THE COURT: Yes. They can be released; that is, the witnesses on the motion for continuance.

MR. PHILIPS: That's right. May I make it clear, so there will be no misunderstanding in this respect? We subpoenaed Mr. Kennedy, Mr. Cooper, Mr. Johnstone, Mr. Sonier and Mr. Callahan, and Mr. Sandusky, to testify on this motion. We would like them to remain under the Court's subpoena for testimony on the case in chief, but we are prepared to release them this morning with reference to the motion.

THE COURT: Well, any of your witnesses you may have on call, but I place the burden on you not to delay the Court.

MR. PHILIPS: Thank you, Your Honor.

THE COURT: All right.

MR. PHILIPS: Your Honor, I have another motion to present to the Court. Your Honor, this is a

I think the witness is being paid as an expert witness and has an obligation to be here and complete his testimony. We hesitate to give Counsel the opportunity to shorten up his testimony in this extended period of time.

THE COURT: We try to accommodate witnesses with their various other problems, particularly where a man has a school class to meet. In the light of expert testimony I think your fears and apprehensions are greater than they should be. I will let him go.

MR. STILL: Thank you, Your Honor.

DR. CORT SCHLICHTING

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows;

DIRECT EXAMINATION
BY MR. STILL:

Q May it please the court, this is Cort Burt Schlichting. He is 34 years of age and he lives at 301 Vanderbilt Drive in the City of Mobile. He is married.

His education includes a Ph.D. at Louisiana State University. He has lived in Mobile for the past five years.

He is now employed as a Professor of Economics at Springhill and at various other educational institutions around South-Western Alabama.

Would the Clerk hand the witness Plaintiff's Exhibit No. 8, please.

Dr. Schlichting, would you look at that exhibit, please, and tell us if that is an accurate resume' supplied by you?

A Yes, it is.

Q All right. Your Honor, among other things, that exhibit shows that Dr. Schlichting is an expert or has worked as an expert in several cases in the field of statistics before this court and other courts and has taught courses in statistics. We move his admission as an expert before this court.

THE COURT: All right. You may proceed.

MR. STILL: Dr. Schlichting, did you supervize Tony Parker in the preparation of the data for use in the regression analysis run in this case?

A Yes, I did.

Q Generally, what was the nature of your supervision of him?

A The supervision that I undertook was primarily methodological. He would come to me with difficultics of one sort or another in gathering the data and, between the two of us, we would attempt to solve those problems as they came up.

For instance, voter age population, and

things of this nature. So, this was the primary thing that I did with him.

Q All right. Now, the use of the voter age population, rather than the percent registered in a particular ward, why was that used?

A Well, I think it depends on which particular exhibit you are talking about, but - - I think when you are talking about voter age population, in some of the earlier exhibits that was - - I think that was used primarily because we only had the 1970 census data to deal with, and when we were referring to some of the later years, we felt it might be better to use Dr. Voyles' data, or the Southern Council's data, or whatever, to get voting age population.

Q All right. Now, specifically, in regard to the regression analysis, was there available data on a ward by ward basis indicating the percentage registered by race?

A I think not.

Q All right. Now, you heard Mr. Parker's explanation of how he constructed the - - what we call the synthetic wards in the rural areas?

A Yes, I did.

Q Did you take some part with him in deciding to use that particular method?

A Yes, I did.

Q First of all, why was it necessary to construct those aggregate or synthetic wards?

A It was necessary to construct those synthetic wards because the census data was not broken down in such a way - - it was in the block data. It was tract data. The census data was not available to us in any way that we could fit the census data to the precincts in the county. This being the difficulty, we did - and I instructed Mr. Parker to do this - and do the next best thing; that is find where the census data tracts and the precinct lines coincided, and we found these by the hardest to basically be a North Synthetic Ward Precinct, and a West, and a South Synthetic Ward.

Q Mr. Clerk, hand the witness Defendant's Exhibit No. 1.

Would you look at that map, please, and tell me if the lines that have been marked in on the county map - - I believe they are marked in in yellow.

A They are.

Q Are those the lines between the three synthetic wards created?

A Yes, they are.

Q Are those lines also lines that are established lines of precincts or wards in Mobile County?

A Yes, they are.

Q Would you tell us, Dr. Schlichting, what the function of regression analysis is?

A The function of regression correlation anaylsis is to attempt to determine whether there are any factors influencing other factors. If there are factors that influence a particular variable, whether it be voting or whatever it might be, progression analysis attempts to find a relationship between variables.

Q All right. Now, is regression analysis a standard statistical tool?

A Yes, it is.

Q Is it used for a variety of things besides analyzing voting patterns?

A Oh, indeed.

Q Now, in the particular case we have here, the regression analysis that you ran, what variables were being tested or were being fed into the computer?

A There were three variables; the income variable, the per capita income was one of them. The second variable was the percentage vote that a particular candidate got in a particular election, and the third variable was the voting age - - black voting age population over eighteen.

Q All right. Now, I believe, you referred in your earlier explanation, to the use of the terms independant

variables and dependant variables?

A Yes.

Q Which of those three were dependant variables?

A The one variable as dependant - - and what we attempt to do is find dependant variables to allow us to explain what goes on in the dependant variable. The dependant variable was a vote a person got in a particular ward or precinct.

Q The progression analysis function was to test whether or not that a particular candidate in a particular election was a function of income and or race of the voters.

A Exactly.

Q Now, have you read Dr. Voyles' thesis which is Plaintiff's Exhibit No. 9?

A I have read portions of it, yes.

Q Which portions did you read?

A I read the methodological portion where he sets out how he goes about analyzing the voting patterns in Mobile.

Some of the historical sections I have not read.

Q Does he use regression analysis?

A No, he uses an analysis that is very similar to regression analysis which gives the same results.

Q All right. What is the method he uses called?

A It is called Pierson's Product Movement Method.

Q Is there any significant difference between the Pierson's method and the Correlation Analysis Method that you used?

A No. It gives the same results.

Q All right. Now, Mr. Clerk, would you hand the witness Exhibit Nos. 10 through 52, please.

Your Honor, we have a bench copy of these computer print-outs, if you would like to see them.

THE COURT: All right.

MR. STILL: Now, you have had a chance to look at Exhibit Nos. 10 through 52, I believe, yesterday at our office here in Mobile, haven't you?

A Yes, I did.

Q Are those xerox copies of the computer print-outs that were made as a result of the regression analysis that you ran?

A Yes, they are.

Q All right. In each case there are three columns of figures, I believe, at the top of each computer print-out.

A That is correct.

was that race was quite a significant factor; whereas in a general election, that was not necessarily the case.

Q All right. Now, I believe that some of these dots, in addition to the slashes, some of these dots have numbers on them.

A Yes.

Q Are they keyed to something on Exhibit No. 53?

A Yes, they are keyed to the places 1, 2 and 3 - - I think are the numbers on Exhibit No. 53. One was Yeager, two was Smith, and three was Stevens in 1962 and the numbers on those little dots would indicate that that dot went along with those particular numbers.

MR. STILL: All right. Thank you very much.

Your Honor, that completes our examination and I note that is about two minutes until three.

THE COURT: All right. Let's take about a 20 minute break.

(Recess)

DR. MELTON A. McLAURIN,

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION
BY MR. BLACKSHEAR:

May it please the court, this is Dr. Melton A. McLaurin. He was born July 11, 1941 in Fayetteville, North Carolina and his present address is 808 Deerfield Court, Mobile.

He has a Bachelor of Science and Master of Arts degree from East Carolina University and a Ph.D. in American History from the University of South Carolina.

He is Associate Professor of History at the present time from the University of South Alabama.

Would the Clerk show the witness Exhibit No. 1.

Dr. McLaurin, is Exhibit No. 1 a reasonably up-dated copy of your curriculum vita?

A Yes, it is.

Q One of the things I noticed not listed there were the professional societies and associations you are a member of. Can you tell us about them briefly?

A I am a member of the Alabama Historical Association and a member of the Southern Historical Association, and a member of the National Education Association.

Q Dr. McLaurin, you were born in North Carolina. When did you come to Mobile?

A 1967.

Q What brought you here?

A Employment at the University of South Alabama as an assistant professor of history.

Q Have you been teaching at the college level very long?

A Since 1963.

Q What has been you field of speciality in your academic career?

A American History and, particularly, the history of the South and, since I have been in Alabama, development of the history of Alabama.

Q Since you have been in Mobile, have you devoted any time to a study of the history of the Mobile area in particular?

A Yes, I have, particularly the economy and social systems of Mobile.

Q Over approximately what period of time; the history I am speaking of now?

A Well, the economic history of the area and, to some extent, the social history of the area, especially since 1813. The development of the American period. I am not very expert at all on the Colonial period.

Q At the University of South Alabama, do you teach courses in Alabama history and Mobile history?

A Yes, I do a teach credit in Alabama history and a non-credit course in Mobile and the development of the city.

Q Have you ever testified in court before, Dr. McLaurin?

A Yes, I have.

Q When was that?

A I can't recall the date. It was in a similar case involving the City of Mobile and the Plaintiffs in this case.

Q And that was in the Bolden versus the City of Mobile?

A That is correct.

Q And you were called as a witness for the Plaintiffs in that case?

A That is correct.

Q Your Honor, we move that Dr. McLaurin be qualified as an expert witness on the subject of Southern History, generally, and on the history of Mobile.

THE COURT: All right.

MR. BLACKSHEAR: Dr. McLaurin, tell us what was the beginning of the political activity of black citizens in the Mobile area?

A Well, that entire movement can be condensed rather briefly. Mobile blacks began their development in politics with the adoption of the Reconstruction Acts of 1867.

They met in Mobile in convention to first

petition that they be allowed to participate in the political process, and, from that period until 1901 were active in the political process in the city and county and the state.

Q Were there many black voters during that period?

A Oh, yes. I couldn't give you exact figures, but there were several hundred black voters registered and active in the politics, local and state and congressional district politics, the entire spectrum of politics of Alabama in that period. There were certain wards in the city were, for example, predominantly black.

Q Did blacks vote actively during that period?

A Yes, blacks voted actively in both the county and city during this period.

Q What happened in 1901 to change the picture?

A Blacks were disenfranchised deliberately by a new constitution that was adopted by the state of Alabama in that year. After that time, the disenfranchisement section of the Constitution, coupled with the development of the white primary which was approved by the Supreme Court of the United States in later decisions, for all practical purposes, eliminated blacks from any participation in Mobile County and for the state of Alabama, for that matter.

Q Tell us about the 1901 Constitutional Convention from a historical viewpoint, the purpose of that

convention?

A There were several purposes of the convention, but from a historical viewpoint, I think the majority and over-riding reason for the convention was to disenfranchise blacks.

There were other questions involved, and one of the questions was restriction of suffrage in general. Other questions that came up involved the establishment of railroad commissions and other matters of a general reform nature.

Q Why did the delegates to the 1901 convention want blacks disenfranchised?

A Well, the reasons here would be relatively complex and, of course, some delegates did not - - there was a small token opposition to that - that is the disenfranchisement of blacks now - token opposition to the disenfranchisement of blacks on moral grounds and some on legal grounds, but there were two basic reasons for it.

The one reason was the fear that there could develop in the future a coalition between black and white voters, primarily of what we would today call Lower Socioeconomic Groups, or Laboring Groups, who would advocate programs that would be, from the viewpoint of certain members of the State Political Hierarchy, detrimental to the economy of the state.

Q What were the devices that the 1901 Constitution employed to disenfranchise black voters?

A Well, the most important device was a literacy requirement which was coupled with an escape clause to allow illiterate whites the right to register.

There were other procedures utilized including a cumulative poll tax. These was the two most important. I think it is important to see, too, in opposition to the disenfranchisement of blacks and too - - there was even more substantial opposition to disenfranchisement of whites. So much so, that the convention had to promise that the outcome of the convention would not, in any way, disenfranchise whites. This was a promise taken by all the members of the convention, because there was substantial opposition and substantial fear that there would be disenfranchisement of whites.

Q And that promise was carried out through grandfather clauses?

A Yes.

Q Was there any opposition among the black community here in Mobile to the 1901 convention?

A There was substantial opposition throughout the state and there was tremendous opposition in the black community on two levels. First, they opposed the calling of the convention and, secondly, as a matter of fact, their

opposition was thrown out when the votes were taken in Mobile. Votes against calling the constitution in Mobile were thrown out. So, it can be said that Mobile went in favor of holding the convention and, secondly, they voted against ratification of the constitution in Mobile, because the black vote was relatively free in Mobile, whereas in the black belt counties, it was almost entirely controlled.

Q And you mentioned the white primary as being another factor in black disenfranchisement. When did black voters again become a factor to any degree in Mobile?

A Well, black voters really were no factor in politics in Mobile until the white primary was stopped and it wasn't stopped in Alabama until after Smith versus Albright case in 1944, which was a federal case outlawing the utilization of the white primary race, and in the 1940's, it was challenged, and blacks were denied the right to vote in the election in 1944.

The Democratic Party of the state of Alabama was then ordered to allow blacks to register and vote in their primary race and they did technically open up the primary race and adopted a legislative program to keep blacks from voting, which was known as the Boswell Amendment.

Q Before you go into the Boswell Amendment, would the Clerk show the witness Exhibit No. 2, please.

Would you identify that xerox copy of an article that you wrote?

A Yes. That is an article that I published in the proceedings of the Gulf Coast History of Human Economics Conference in 1973. It was originally delivered as a paper.

Q Would you give us it's title?

A "Mobile Blacks in World War II, The Development Of A Political Consciousness."

Q Does it concern, in particular, this period during the 1940's and early 50's here in Mobile?

A It concerns primarily the period of 1944 to 1951, yes.

Q We move the admission of Exhibit No. 2 in evidence.

MR. KENNAMER: I haven't seen it, Your Honor.

Judge, we object on the grounds we haven't seen it before and hasn't been furnished to us.

MR. BLACKSHEAR: Yes, sir, we did furnish it to you. It was made available as were all the exhibits in Bolden versus Mobile.

THE COURT: I will have to resolve it.

MR. WOOD: Judge, I made a list of all the documents shown to me by Mr. Menefee and it is not on that

and marked in evidence.)

MR. BLACKSHEAR: This Smith versus Albright case, very briefly, Dr. McLaurin, originated out of Texas, the Supreme Court decision that struck down the Texas White Primary in what year?

A 1944.

Q What happened after this here in Mobile?

A Well, a group of Mobile blacks simply attempted to vote in the Primary election of the following year and were - - of the same year, as a matter of fact, 1944, and were denied access to the poll.

Q Was Mr. John LaFlore and Rev. - -

A Mr. LaFlore is the only individual I know specifically who was in that group. There were a number of - - I think it was 12.

MR. PHILIPS: Judge, I object to this line of testimony unless he was there and saw them vote, then I think this is heresay evidence.

THE COURT: It is heresay, but an expert can testify. Most expert testimony is based on heresay.

MR. PHILIPS: I realize that, but in the area of expert testimony, not in the area of factual testimony.

A It is recorded in Life Magazine. It was in May of 1944, I think.

MR. BLACKSHEAR: The events by which you are testifying about now have been matters of research by yourself personally; is that correct?

A That is correct.

Q And they have been reported in this article and in others?

A That is correct.

Q What happened when these black citizens were refused the right to vote in the Alabama Primary?

A They filed affidavites stating they had been refused the right to vote with the Justice Department and it was, at that time, that the Justice Department decided to allow the Democratic State Party, the State Executive Committee of the Democratic Party, time to rectify it's proceedings to bring them in line with the court decision of Smith versus Albright, which was done within about a year, I think. I will have to look at the article to get the exact date, but it was approximately a year.

Q All right, sir. What did the legislature of Alabama do?

A Then the legislature of Alabama passed the Boswell Amendment, which was the amendment that gave or passed the Boswell Act, which gave the voters - - the registrars rather sweeping powers in their determination as to who could or could not register to vote.

Q Was the intent of the Bosswell Act to allow this discretion on the part of white registrars to be used to keep blacks from registering?

A Of course, that was the entire reason for the passage of the legislation. There was no other reason.

Q Was that the announced intention?

A Yes, it was. Not only the announced intention but the Democratic Party State Executive Committee actually financed a campaign in favor of the amendment under the slogan that the Democratic Party in Alabama was a white man's party, quote, unquote.

Q How did the Boswell Act - -

A It was adopted by the voters of Alabama in 1946 and it was immediately challenged in the courts by a groups of blacks from Mobile, and many of these blacks were veterans of the second World War and they, in effect, took the County Board of Registrars to court claiming that the Boswell Amendment was unconstitutional because it granted these registrars too sweeping powers, and they won their case.

Q That was Davis versus Snell?

A That is correct. It was decided, I think, sometime in 1947, I believe, late 1946 or 1947 it would have been 1947.

Q By this court?

A Yes.

Q There after, after the - - after Davis versus Snell, were blacks then freely allowed to register in Mobile?

A Yes, blacks were allowed to register. There was some - - not prohibition - - some delaying tactics. For example, there were refusals to register blacks who were in line at the time polls closed and things of that nature, but, other than that, blacks were allowed to register.

There was a second effort in 1948 to pass a bill similar to the Boswell Amendment that was based on a description of voter rights, which is contained in the nationalization process, for people who are nationalized to become American citizens, and that piece of legislation was defeated because of a filibuster in the Upper House of the Alabama legislature in the fall of 1948 - - not the fall, but the spring of 1948, I guess.

Q And who participated in that fillibuster?

A There were four or five primarily urban senators who participated in it. For this area, the most important, of course, was Joe Langan, who was, at that time, senator from Mobile County.

Q Did your research reveal that Joe Langan's fillibuster, or participation in that fillibuster, cost him politically?

A I think that his participation in that fillibuster cost him politically. It was a volatile period. It was period in which various elements of the Democratic Party were struggling for the Party in Alabama and, I think, at that time, it did hurt Mr. Langan, yes.

Q Do you have any figures or, I think you have one in your article, about the number of blacks who were registered in Mobile County in 1946?

A I think - - 275 registered blacks in 1946. That is the beginning of the year, January of 1946.

Q Now, back to the - - how substantially did the number of black registered voters improve?

A It improved remarkably, because returning veterans from the war organized voter registration campaigns and this was the reason for the Boswell Amendment by the end of 1946. That is in one year, Mobile County blacks had reached approximately 1,300, a tremendous growth. That was the reason for the introduction of the Boswell Amendment.

Q Now, what was some of the slow-downs you were mentioning that were being employed to hold down the number of blacks who were seeking to register?

A The only slow-down tactic I know is the one of delaying registration of voters who were in the line; if they were in line pass the time to register and one member of the Board of Registrars stayed and worked with these people

after hours, so to speak, but generally the board was closed down.

THE COURT: Was that Mr. Boswell of Geneva County?

A Judge, I don't know what county he was from.

MR. KENNAMER: Yes, sir, Judge.

THE COURT: That is who I thought it was.

MR. BLACKSHEAR: Were there any written requirements whatsoever that remained for a person seeking to register to vote after the Boswell Act or amendment was stricken down?

A Yes, sir. There were still educational requirements, the ability to read and write, the Constitution of the United States. Essentially, a literacy test.

Q One more point, Dr. McLaurin, does your research reveal what seems to be common knowledge to most of us that blacks, since their re-entry into politics in the 1940's, have been predominantly in the Democratic Party?

A Yes. I think that is true and it has been true. It is just something that has occurred nationally, not just in Mobile and the state of Alabama.

Blacks, by and large, since 1932 have identified with the Democratic Party. That was certainly true in Mobile County, because the Democratic Party was essentially the only party in Alabama and in Mobile until

- - well, until the middle 50's when Mobile's political voting record on national - - in national elections began to change, and then, in the 60's, when it began to change on the county and district level, but still most blacks are identified with the Democratic Party and it also shows that there was a tremendous desire to actively participate in the political process on the part of the Mobile blacks.

Q Can you tell us what effect the 1965 Voting Rights Act had on black voter registration?

A I have not - -

MR. WOOD: I object to that. I think that is outside of his field of expertise. That is practically current events. I think this man is unqualified to answer that question.

THE COURT: I will let him answer. Go ahead.

A Judge, I would not be answering.

THE COURT: If you can't answer - -

A I could not answer that from the standpoint of a research historian.

MR. BLACKSHER: All right, sir. That is all we have.

CROSS EXAMINATION
BY MR. KENNAMER:

Q Dr. McLaurin, if we go back to the end of

A That is correct.

Q Most blacks were elected in the black belt at that time, were they?

A That is correct.

Q All right. Now, then, after that election of 1896, four years later, is when the movement began to have a constitutional convention in Alabama, wasn't it?

A That is correct.

Q Now, the constitutional convention and, I realize that the president of the convention, the presiding officer, and all of them, made speeches about how they need to write a constitution to keep the blacks from voting . . .

A Yes, sir.

Q . . .but that really wasn't the purpose of the constitution, was it, the constitutional convention, wasn't it, to write a constitution to keep the poor whites from voting?

A It was to write a constitutional conventi that would forever eliminate the possibility of pulling of the kind of coalition that certain Populists, including Joseph Manning, would like to have seen developed, which was essentially a coalition of black producers - as

the Populists used to refer to them - those people who produced, and, of course, you know the big villians of the Populists were the railroads and the trusts and the banks, and they had a whole list of villians that they didn't consider producers. What they wanted to do was form a coalition of both blacks and whites, what we call today - working class people, and the constitution of 1901 was an effort to see that such a coalition never took place in Alabama politics and, I admit, it was a wonderful piece of work in that it entirely prevented it for a good while.

THE COURT: What happened, it ended up preventing the blacks from voting but let the whites vote because of the grandfather clause?

A Yes, the blacks could be disenfranchised Those who had fought to develop this constitution and a restrictive franchise, as I have said before, there were probably people at that constitutional convention, if they could have disenfranchised anyone that made less than $30,000 a year, they would have been happy to do so.

They were able to disenfranchise the black vote, but did not have the strength to disenfranchise the white vote, and they had to take an oath, in essence, that they would not do that.

One of the ways the Populists were beaten

down in Alabama, as the other southern states, was to say, in effect, that the Populists were going to revert back to a radical reconstruction government and give blacks major offices, and so forth and so on. So, the racial tactics and racial scares that became so bitter in southern politics were really developed in this period. Some old Populists went on to refine them even more.

Q First of all, that constitution of 1901 eliminated females, didn't it? Doesn't it start off by seeking votes, all males?

A But, the constitution of the United States eliminated females. They were following standard operating procedure.

Q It starts off eliminating females, doesn't it?

A Yes.

Q Doesn't the poll tax that was written into the constitution of 1901, wasn't it for the purpose of helping it to eliminate poor whites?

A Yes, it was.

A And it was a cumulative provision, wasn't it?

A Yes, it was to 45 years of age, if I am not mistaken. I think that was the cut-off figure.

Q If you missed a year, you couldn't vote, unless you paid the prior year and that year?

A That is right.

Q Dr. McLaurin, in your study of Alabama history, you don't eliminate the Federal Judiciary as being a part of Alabama history, do you?

A No, sir. I must admit, however, that I give very little attention to the Federal Judiciary in Alabama until the 1940s when they began to get Civil Rights cases, primarily.

Q When you speak of the Federal Judiciary in Alabama, doing something that isn't some foreign power, it is Alabamians, isn't it, Alabama history, and a part of the history of Alabama?

A Well, yes.

Q Do you know who was one of the three judges, or do you know the three judges that struck down the Boswell amendment?

A No, I do not. I have it in notes, but I do not know the individuals involved in that case.

Q Did you ever hear of John McDuffie?

A No, sir. I don't know the judges.

Q Did you ever hear of John McDuffie as a Congressman from Alabama?

Q All right. Doctor, would it be concerning the background of blacks in the political process in Mobile County, would it be fair to generally summarize what you have said that blacks began involvement in politics in Mobile County with the Reconstruction Acts of 1867?

A That is correct.

Q And prior to that time, they were not a part of the political process in Mobile County?

A That is correct.

Q And that they were then active until 1901, and then that they again were eliminated or disappeared from participation in the political process of Mobile County in approximately 1901?

A That is correct.

Q By terms "actively a part of the political process in Mobile County", do you mean that they did not go and were not a political factor?

A That is correct.

Q All right, sir.

A They could not vote in the Democratic party.

Q So, prior to the Reconstruction Acts of 1867, they were simply a non-entity as far as politics were concerned?

A That is correct.

Q All right. In typical elections in Mobile County, during the period of time, from 1915 until 1925, approximately how many blacks would vote in the election in Mobile?

A From 1915 until 1925?

Q Yes, sir.

A I could not give you exact figures. I would say no more than 200 blacks.

Q By comparison to approximately how many whites?

A Again, I couldn't give you exact figures. I would think somewhere - - it was a tremendous increase in voter registration, probably ten or twelve thousand. I don't know, Mr. Philips. I couldn't give you an exact figure.

Q Let's shift then, just a minute from Mobile County to the State of Alabama as a whole, in the Alabama Legislature.

Were blacks a part of the political process in the Alabama Legislature prior to the Reconstruction Acts of 1867?

A No.

Q Then, during the period of time from 1867

to 1901, were they actively inv-lved in the Legislature?

A I couldn't give you the exact date the last black served in the Alabama Legislature. They were actively involved up until 1875 when you got a new Constitution. Even then, they still had political rights. There may have been some after that, but they were voting in Legislative politics.

Q So, after 1875, they had no influence in the Legislature at all, did they?

A No, I wouldn't say that they were voting after 1875.

THE COURT: But had no membership?

A Had no membership. I don't know for sure, Judge, but I would say the membership would be very minimal after 1875, and would pretty soon be non-existent, except, perhaps, during the Populist period, and I don't recall a person being elected then.

Q Say after 1901, were there any blacks in the Legislature?

A No blacks in the Legislature. As a matter of fact, I don't believe there were any blacks in the Legislature after Reconstruction of 1876. I think that is correct, but after 1901, there would definitely be no blacks.

Q All right. During the period of time from, say 1901, forward, - - from, say, 1901 to - -, well, after 1901 when did blacks begin to become a part of the political process in Mobile again?

A After 1944.

Q After 1944?

A Yes.

Q All right. During this period of time from 1901 to 1944, given the situation that you have described, were blacks had been completely removed from the political process in Mobile County, if the people of Mobile County had been desirous of preventing blacks from serving as elected members of the school board, would it have been necessary for them to take any particular exclusionary steps - - to take any particular step to avoid them being elected to the Board?

A I don't follow you. I am sorry. I don't understand your question.

Q All right. Let me back up a little bit. You have described that during the period of time from 1901 until 1944, that blacks were simply not a part of the political process in Mobile County?

A Yes.

Q Not a factor, politically, in Mobile

County?

A Right.

Q I am asking you, then, given that situation, during this period of time, if the people of Mobile County had wanted to prevent blacks from being elected to the School Board in Mobile County, would it have been necessary for them to do anything more, or were blacks already in a position where they could not be elected?

A In my opinion, it would have been unnecessary for them to do anything else.

Q Would it be unnecessary for them to establish a school board elected in any particular manner to prevent blacks from being elected to the board; is that correct?

A That is correct. It would have been unnecessary.

Q All right, sir. Now, during the period of time, from the time, say, 1825, 1826, up until the Reconstruction Acts, I believe you said, for the same situation, blacks were simply not a factor?

A That is correct.

Q If the people of Mobile County had wanted to establish a method of election of the school system, or the school board, that would avoid blacks becoming a

member of the board, would it have been necessary for them to do anything, or were blacks already in that situation?

A The question is a moot question. I don't think it would have occurred to them that blacks would have become members of the board, but it would not have been necessary, not before 1865, certainly.

Q It would have been impossible?

A Yes.

Q It would not have been necessary for them to set up the board and provide for the manner of election to the board in any particular way to avoid blacks coming on the board?

A That is correct.

Q Have you had any occasion to make a study of the mechanics of the Mobile County Public School System over the years?

A No.

Q Have you made any study of the election of the members of the school board over the years?

A No, I have not, and I am not familiar with elective members of the school board, outside of the period of my own political experience.

Q Do you know the names of the present members of the board?

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THE COURT: All right.

MR. BLACKSHER: Your Honor, Dr. Goode was unable to be here. At this time, we have Dr. McLaurin to continue, if it please the court.

THE COURT: All right. That is the way I wanted to do it. I wanted to finish with him anyway.

DR. MCLAURIN

the witness, resuming the stand, testified further, as follows:

THE COURT: Mr. Philips, I will remind you it is with the discretion of the court, matters beyond the direct examination gone into and, with the minuteness of the examination and the matters I mentioned to you yesterday, I am going to limit your examination to about thirty minutes this morning on these matters that were not gone into on direct.

MR. PHILIPS: Yes, Your Honor.

CROSS-EXAMINATION

BY MR. PHILIPS:

Q Dr. McLaurin, yesterday in your testimony I believe you told us that up until the Reconstruction Acts in 1867, black persons in Alabama could not vote; is that

correct?

A Yes sir.

Q And they were not involved in the political process, were not a political factor, and I believe you said they were, in essence, a non-entity from a political stand-point.

A Yes sir.

Q Given that situation that you have described; in your opinion, would an act passed by the legislature of Alabama in 1826 providing for the Mobile County Public School System to be governed by a board of citizens elected by a majority vote in county wide, at large, elections, would that have been passed with the purpose in mind of preventing the election of black persons to that board?

A No.

Q All right. In your opinion, could those responsible for the passage of such an act reasonably have foreseen that that system of government of the school system or that system of election would, in the future, have the effect of preventing black persons to election of the School Board?

A That would not have been one of the considerations.

Q It would not?

A It would not.

Q In your testimony you said after the end of the

era of the Reconstruction Acts and beginning with the passage of the new Constitution of 1901 or it may have been shortly than before, but roughly then, and continuing through approximately 1944 that black persons were again in that position of being a non-entity, politically speaking, in Mobile County; is that correct?

A That is correct.

Q Given that situation as you described it, if the legislature of Alabama passed an act providing for a school board of citizens elected by majority vote in county-wide, at large, elections; in your opinion, would that act have been passed with the purpose in mind of preventing the election of black persons to the School Board?

A Are you talking about during the period of 1901 to 1944?

Q Yes sir.

A In my opinion, any legislation passed, at that time, would not have been unmindful of the possibility of future negro votes, but it would not have been a major motivating factor.

Q It would not have been unlikely, would it?

A I repeat, I don't think it would have been a major motivating factor. I do think it might have been a consideration, reasonably not in absolute detail about how people were elected, but just as a general concept.

Plaintiffs were to prevail in this law suit, wouldn't you like to be in position to look back and say - -

THE COURT: That is argumentative. Let's go on to another question, Mr. Philips.

MR. PHILIPS: That is the last question I have, Your Honor.

THE COURT: Do you have any questions?

RE-DIRECT EXAMINATION

BY MR. BLACKSHER:

Q Dr. McLaurin, Mr. Philips asked you about some of the campaigns you worked in and, in the course of your answering, I think you said that with regard to the white candidates for whose campaigns you had done some work, tha they had had some practical constraints with regard to how they would appeal for the black vote. Would you be more specific about what you meant?

A Well, I think it is generally common knowledge in political circles that, in attempting to appeal to the black voters, one has to balance off - -

MR. PHILIPS: Your Honor, I object to that testimony on the basis of common knowledge. My examination was limited to his personal experience in these areas and I think this examination should be

A All right. I will rephrase my answer. In my

personal experience, I have seen that in order to appeal to the black vote, if there - - when there was such a thing that white candidates could not, as openly, appeal to blacks as they can appeal to whites, and my personal reaction to the situation was that it was somewhat demeaning to both blacks and whites involved in the process.

MR. BLACKSHER: In what ways would some of the white candidates, whose campaigns you worked in, appeal for the black vote? Would they go out to meetings in the community?

A Prior to the recent - - very recent years, last two or three years, it was not done.

Q But, in recent.

A Except by one candidate, I would say that Joe Langan did that.

Q And when Joe Langan went out to a meeting in the community, was it politically possible or practical for him to advertise that he had gone and sought the support of these people and list these black leaders among those persons supporting him.

MR. PHILIPS: Your Honor, I object to that. That calls for an opinion that this witness has no basis to testify to. I think Mr. Langan could testify to that.

MR. BLACKSHER: Your Honor has allowed this witness to give his personal opinion on a wide range of

subjects.

THE COURT: I surely have. I will let him answer it.

A My personal opinion is that, as the racial issue became more heated, it did not do Mr. Langan any good to have his associations known, his openness, his frankness on this issue.

Q You were more active in the campaigns of the legislative campaigns of Charles Bell and Clarence Montgomery than you were in most of the other campaigns, weren't you?

A Yes. I was extremely active in both of those campaigns.

Q Concerning those two campaigns, which was for a specific election to fill two vacancies in the House of the Representatives; is that correct?

A Yes.

Q I would like to read you a brief passage from Exhibit No. 9, which is Dr. Voyle's dissertation in which he is commenting about those two races.

He says, and I quote, "also in 1969, the Republican Party felt strong enough to demand representation in the county's legislative delegation, a local attorney filed for one of two vacancies in a special 1969 legislative contest. The Democratic Party in the campaign

had a candidate supported by George C. Wallace, who they wanted elected at any cost, since two black candidates were willing and one for each state, and that would have been Mr. Bell and Mr. Montgomery. It was feared that a head-on confrontation between Nettles and Lyons would result in a plurality for a black in one of the elections and thus an agreement was reached. Lyons would run for one place and Nettles for the other. In return, the Democratic County Committee agreed that Nettles would place no strong opposition in his contest since this was a special election.

The Democratic County certified the Democratic candidates without primary elections and kept their promise not to run a candidate against their candidate Burt Nettles.

Were you active enough in their campaigns for Mr. Montgomery and Mr. Bell to verify the fact in which these events occurred?

MR. WOOD: Your Honor, I object to that question. That exhibit is not in evidence and we haven't had an opportunity to test it's authenticity or it's accuracy. In addition to that, it is totally irrelevant.

Legislative races have no relevancy in county elections or school board elections, and that is the basis of my objection to that question.

THE COURT: I will let him answer.

A I would not disagree with Mr. Voyle's dissertation on that subject.

THE COURT: No, that is not what he asked you. He asked you were you familiar enough with the races to be able to verify that that occurred or not.

A I could not testify directly that such an agreement between the Democrats and the Republicans occurred, no.

MR. BLACKSHER: Was there in the Bell or Montgomery campaigns a conscious political strategy that they adopted to take into account that they were black candidates running in a county-wide race in Mobile County?

A Oh, yes. They believed that with both a Republican and Democratic candidate in the race, if they could get reasonably attractive black candidates to enter the race, there wouldn't be the primary problem that there - - there were actually four candidates in one of the races - - that there would be more of split in the vote, and they were hoping that they could appeal to the black vote and try to draw some support from enough whites, just a few whites, which they thought was the only possible thing in such a race, that they could perhaps elect a black member to the state legislature with only a plurality. They felt this was the best chance that the black community had had since Reconstruction to send a black representative to the

state legislature.

Q Who did Mr. Bell end up running against?

A Mr. Bell, in that race, ran against Mr. Nettles, who was the Republican candidate, and Mr. Harry Clark, who was the Democratic candidate, and Mr. Bill Westbrook, who was another independent candidate in the race.

Q How did that election come out?

A Mr. Nettles won in the election with an absolute majority, 51%.

Q Did Mr. Bell get substantial support from the black community?

A Yes, he did.

Q What happened to Mr. Montgomery? Who did he end up running against?

A Mr. Montgomery was paired against Mr. Lyons, and I don't have the vote totals on that, but Mr. Montgomery was rather handily defeated by Mr. Lyons in that race.

Q Was there a Democratic candidate certified in the race in which Mr. Bell was a candidate?

A Yes.

Q Who was that?

A Mr. Clark.

Q Who was Mr. Clark? What was his background?

A I am not that familiar with Mr. Clark's background.

CAIN KENNEDY

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

May it please the court, this is Mr. Cain J. Kennedy. His address is 317 Montgomery Street, Pritchard, Alabama.

Mr. Kennedy has earned a Bachelor of Arts degree from California State University in 1966; his Law degree from George Washington University in Washington D. C. in 1971. He is a practicing attorney here in Mobile County and is the elected member of the House of Representatives from House District 98.

Mr. Kennedy, would you tell the court - - were you born in Mobile?

A No. I was born in Marengo County, Thomaston, Alabama.

Q How long have you been a resident of Mobile County?

A I came here in 1955 and lived here for two years and I went away for the next fifteen or so years and came back in 1971.

Q Did you go to the Public Schools here in Mobile

County?

A Yes.

Q Which school?

A Mobile County Training School.

Q When it was an all black segregated school?

A That is correct.

Q Did you enter the Navy when you got out of high school?

A Yes. I went into the Navy right out of high school and I remained there for six years.

Q All right. And you came back to Alabama after you finished your law school?

A That is correct.

Q Would you tell the court the extent of your activity in Mobile County politics?

A Well, I was elected in 1974 to the Alabama State House of Representatives from District 98 and, of course, I was elected as a delegate to the Democratic National Convention, this year, 1976. That is the extent of my politics.

Q In those elections, were you required to run county at large?

A No. I was required to run from districts.

Q Would you describe to the court the demographic characteristics of House District 98?

tics in Mobile over a long period of time.

THE COURT: Did you come back to live - -

A I came back to Alabama in 1971 and came to Mobile in 1973.

THE COURT: I will let him tell about based on his political experience since '73 and not before that.

MR. BLACKSHER: All right, sir. Could you answer the question?

A Would you ask me the question again?

THE COURT: He wanted to know if race was a factor in Mobile County politics.

A It has been my experience that race is a factor in Mobile politics during the time I have been here.

MR. BLACKSHER: How have you seen that factor evidenced?

A Well, I saw it evidenced in the - - much recently in the Wiley - Bridges race. That is the most recent case I can recall.

Q What happened?

A Well, of course, there was some literature that was put out in the community implying that - -

MR. WOOD: Your Honor, I object to this testimony unless the literature is brought in before this court as direct evidence.

THE COURT: I am going to let him express an

opinion.

A There was some literature put out in the community accusing Ray Bridges of turning loose some Deputy Sheriffs on some high school students during the time they had some incidents at Murphy High School. It was accusing him of catering to the blacks of the community.

Q Aside from the literature that you have seen, or the advertising that you have heard in these campaigns, what other evidence have you seen of race as a factor in the voting patterns here in Mobile County?

A Well, another example in the voting patterns - - it was, I would think, that the Perloff - Buskey race would be an example.

MR. WOOD: Your Honor, I object to any testimony on the Perloff - Buskey race. It is completely irrelevant. That is a single member district. This matter refers to multi-member litigation.

THE COURT: I will overrule and let him answer.

A I would think that that would be an example, since, in that district, Buskey received, I believe, just about 80%, 80 to 85% of the black votes and Perloff received about 90 to 95% of the white votes. It might have been a little more.

MR. BLACKSHER: In your campaign for office to House District 98, did you devote a substantial part of

House District 98?

A Well, I used to, before I had my phone changed. I received a number of calls. So, I finally had it disconnected and had a private number placed, but I just received too many calls and it got to the point that I became frustrated because I couldn't do anything about the problems people were concerned with.

Q You are a legislator, not an administrator?

A That is correct. I might add, that I had gotten calls as far away as Birmingham complaining to me about problems.

THE COURT: Well, let's don't go into Birmingham's problems. We have enough down here.

MR. BLACKSHER: Mr. Kennedy, you offered yourself, as it turned out, successfully for representative of House District 98. Would you have considered running for county-wide offices, such as the School Board or County Commission?

A No.

Q Can you tell us why?

A I believe that my chances of success would be rather nil.

Q What do you base that opinion on?

A I base that opinion on that fact that the blacks constitute a decided minority in terms of total voters in Mobile County and, of course, based on the fact that there

have been a number of other persons who have run county-wide and none have been successful.

Q What about the white politicians who do run in these county-wide elections. Do they solicit the vote of the black citizens?

A I think they solicit the vote of the black citizens. Some campaign in the community. Some don't.

Q How do they go about it?

A It has been my experience that, of course, some of the white politicians come into the community and get to know the people in the community and talk about the problems in the community. I don't know whether they talk the same talk in the black community as they talk in the white community.

Again, some of the others contact key black people in the community, those people who have some kind of influence, and try to get votes that way.

Q Have you observed these candidates to have expressed the concerns that you have told us about that exists in the black community about certain problems openly in their campaigns?

A I have seen them express some of these concerns in the black community. I don't know whether or not they express these concerns in their overall campaigns.

Q What I meant, was openly in the media that goes

throughout the county?

A No, I have not.

Q Is the cost of campaigning any factor, in your opinion, why black candidates do not offer themselves for county-wide offices?

MR. WOOD: Your Honor, I object to that.

MR. BLACKSHER: Can you tell, in your opinion, as a politician, what it would cost to run for, say, the County Commission?

A . To run a viable campaign, upwards of $25,000; perhaps more.

Q And what about for the School Board?

A I would think that the School Board would cost less.

MR. PHILIPS: Your Honor, I object unless the witness can show some familiarity for campaigns with the School Board or some contact with campaigns for the School Board. Any opinion he might have on that would be no better than anyone else in this courtroom.

THE COURT: I think someone running for office has some judgment. If you run for office in a small area or large area, I will let him express an opinion. I was involved in politics, before I came on the Federal bench, all of my adult life. It defies common sense that people involved in politics don't have knowledge for it.

MR. PHILIPS: Your Honor, he has run on one occasion in one district-wide race attempting to testify - -

THE COURT: I suggest you run for a race one time and you will get some judgment.

MR. PHILIPS: Your Honor, I suggest I have, and I was elected about that particular race.

MR. BLACKSHER: What kind of cost are we talking about?

A Well, it all depends on whether or not you use the media. I didn't use it except in a very small way. The cost of my campaign wasn't that great.

Q Could you afford not to use it in a county-wide race?

A Well, I don't believe you could afford not to use it and be successful.

Q Mr. Kennedy, does your experience as a member of the Alabama Legislature - - has it shown you that the legislators of Alabama today are aware of the effect that the at large voting system in Mobile County has on the black vote than it's delusion?

MR. WOOD: Your Honor, I object to that question.

THE COURT: Read that question back to me, Mr. Reporter.

(Whereupon, the last question was read by the

Court Reporter.)

THE COURT: I will let him answer.

A Yes.

MR. BLACKSHER: Tell us what your observations have been in that regard.

A Well, take for instance, when I introduced the Bill to re-district the county School Board, I think the first thing that my colleagues asked, the first question, very first question, would be how many blacks would your Bill put on the School Board, or how many blacks would your Bill put on the County Commission. I think they are acutely aware that a black has no chance of being elected in Mobile County as long as the races are at large.

Q And they are aware of what single member districts would do to the chances of blacks to be elected.

A Certainly they are.

Q You introduced in the 1975 legislature two bills to re-district, or to cause the County Commission and the School Commissioners to run in the districts; is that correct?

A That is correct.

Q And eventually your Bill for the School Board was able to pass.

A The School Board passed and the County Bill, of course, failed.

Q First of all, was the School Board Bill passed as you originally offered it?

A No, it was not passed as I originally offered it.

Q What changes were made? What amendments?

A The most significant changes that were made were changes made to accommodate the commissioners who were in office, at the time, the people who came up for election this year.

The change was made to accommodate, I believe, Dr. Berger, because, in my original bill, I had District 1 which would be the northern part of the county scheduled for election, but we shifted that around to make it possible for Dr. Berger to run again and, I think, an accommodation was also made for Mr. Williams, because his District, the area in which he lived, was not scheduled for election in this year. That was the two main accommodations that we made.

Q When was the district which had a majority black population scheduled for election in the final bill?

A I am sorry. That was also another accommodation. In my original bill, it was scheduled for this year and, of course, in the amended bill, the one that finally came out and the one finally signed by the Governor, that was postponed until 1978.

Q How were you able to get this bill enacted even

in it's amended form?

A That was kind of a part of an overall compromise situation.

We agreed in the Senate that my bill would be let out of the Senate if I, of course, voted for the Chickasaw Annexation Bill.

Q That was Senator Perloff's Annexation Bill?

A Right. As you know, the legislature, the local legislation, was at a stalemate at the time. I think Senator Perloff was not going to let anything through unless we took some favorable action on his Annexation Bill.

The effect of the whole compromise was that my vote on the Chickasaw Annexation Bill would serve to move that bill out of committee and then, of course, to move out of the local legislation.

Q Mr. Kennedy, would you say, for the record, whether there was any connection between this law suit and the bill that you filed in the 1975 legislature for making the County Commission and the School Commissioners run out of districts and which occurred first?

A I believe I filed my bills before you filed the law suit.

Q And did you participate in any way in the preparation of the papers of this law suit, or the planning of the law suit, or the strategy of the law suit?

A No, I did not.

Q Did the lawyers in this law suit for the Plaintiffs participate in any way in suggesting how your bill should be drawn or that your bill be drawn?

A No.

Q Did we suggest that you - - did we in any way suggest that the bill be filed?

A No.

Q During the course of the legislature in '75, did the dependency of this law suit, which did come after the bills were entered, play any part in the discussion that you had with other legislators about those bills?

A I would think - - I think the law suit was certainly mentioned, and I tried to impress upon my colleagues that the law suit was in litigation. If we didn't do something, the court probably would.

Q Tell us why the County Commission Bill didn't pass?

A Well, I had been led to believe that there was no opposition against the County Bill when I voted for the Chickasaw Bill.

Q You mean the bill that broke the log jam . . .

A Right.

Q . . . in the final days of the session?

A That is correct, but after the log jam was broken,

then, there was a complete change of attitude. Senator Bill Roberts, at that time, informed me that he could not let the County Commission Bill through.

Q Did he tell you why?

A Well, I think - -

MR. WOOD: Your Honor, I object. That calls for heresay.

THE COURT: Overruled.

MR. BLACKSHER: Mr. Kennedy, did you oppose Mr. Sonnier's bill to district the School Board in the 1976 legislature?

A I voted against it, yes.

Q Could you tell the court why?

A There were a number of reasons that I voted against it. Three that I can think of.

After the 1975 bill was passed, I think the School Board took it to court, and it was declared invalid for the reason that it had not been advertised correctly. The reasons that I opposed Mr. Sonnier's bill were three. I had been led to believe, subsequent to the passage of the 1975 bill, that the Mobile School Board was created by a constitutional amendment and, therefore, could not be changed by a local bill or general bill, not by the legislature. Again, the Sonnier bill had double classification. There was an inconsistency in addition to the double classification. There was an inconsistency in the title of the bill and the body of the bill, and I thought it would be unconstitutional for that reason.

Q Under the Alabama Constitution?

A That is correct, and, of course, the third reason was that I felt that there was too much of a disparity between School District 1 and the other four districts in the bill, and my bill, and in Nat Sonnier's bill, School District 1 would have included House District 96 - 95. Those parts of Mobile County, plus 97. That district would have been about 10,000 voters less than the other four districts

Q Mr. Kennedy, did you oppose the Sonnier bill at the request of Counsel for the Plaintiffs in this case?

A No, sir. I didn't oppose it at the request of Counsel.

Q You did have a conversation with at least one of the lawyers of the Plaintiffs in this case at some point.

A I had a conversation with a number of people, including probably one of the lawyers - - one of the Plaintiff's lawyers.

Q Tell us about the state action that was filed and resulted in the 1975 School Board Bill which you had introduced being declared unconstitutional under the Alabama Constitution. What was the - - well, as it is a matter of record that there was a discrepancy in the advertising

of the bill that the court found, could you tell us a little bit about what that discrepancy was coined to be?

A I don't know anything about it except what I read.

Q Can you tell the court whether the bill was defended in the state action?

A No, it was not. I don't believe it was defended. I think the attorney generally is charged with defending.

Q I mean, you did not appear either as Counsel or as a client in some way to try to defend that bill?

A No, I did not. I did not appear.

Q That would not have been your province or your capacity?

A That was not my responsibility to defend any legislation passed by the state legislature.

Q Did you see problems in the Sonnier bill that might also have been subject to attack in a similar state court proceeding?

MR. PHILIPS: Your Honor, I think he has already testified to that.

THE COURT: If you say any problems in addition to what you have already told us?

A No, sir. No problems in addition to what I have already said.

MR. BLACKSHER: I welcome ground rules for repetition.

A Yes, sir.

Q What do you mean racism issue? What exactly does that mean to you?

A It means that there are a substantial number of voters in Mobile County who will vote for a candidate for that reason, for race alone.

Q In other words, black people vote for a black candidate and white people vote for a white candidate, solely because of race?

A I think that the percentage that will vote for a candidate solely on his race is much higher.

Q You think that white people do that more often than black?

A Yes.

Q Do you have any reason for making that statement?

A Yes. I think Senator Perloff's race was an example. More blacks voted for Senator Perloff than whites did for James Buskey.

Q That is your example? Sometimes the word "racist" is used in this connotation or this sort of discussion, "racist".

A I have heard the word, yes.

Q You are saying that whites are more racist than blacks?

A No, sir. That is not what I am saying, but that

shows - -

THE COURT: Of course, he has a right to testify. If you want to tell him, you have a right to do that.

MR. WOOD: I think that is just totally inaccurate, Your Honor. I am taken by surprise. That is all.

THE COURT: Do you have both population figures and registration figures?

MR. MENEFEE: This is population, Your Honor.

THE COURT: I think, and I will have to speak from the other trial, I think the voter registration is much closer to 50/50.

MR. WOOD: Would you agree to that, Mr. Kennedy?

A Sure, I would agree to that.

Q All right. Now, in that race, in that Buskey - Perloff race, you said that that was an example of where race was used as a factor?

A No, sir. I didn't say that.

Q You didn't say that?

A No, sir.

Q There wasn't any racial campaigning in that particular race then?

A No.

Q Race was not a factor?

A It may have not have been, not to my knowledge.

Q All right. Well, then, that was given by you

as an example of race being a factor in Mobile politics.

A No, sir.

Q That particular race?

A No, sir.

Q You did not use the Buskey - Perloff campaign as an example of race being a factor in Mobile politics?

A I gave an example of race being a factor.

Q You deferentiate between factors and what?

A The question was whether or not it was a racist campaign or not.

Q You concede it was not a racist campaign?

A Not as far as I know.

Q As far as you know it was a straight good clean-cut - -

A Race was a factor, not racists.

Q Whites voted for Mr. Perloff and blacks voted for Mr. Buskey and it divided that way?

A Yes, sir.

Q Now, you gave an example, Wiley - Bridges, or something you considered unfair or racist, didn't you?

A Yes, that was the literature that I had seen.

Q But you don't have that literature?

A No, I don't have it.

Q Do you know who put it out?

A I have no idea.

Q Do you know where it was put out?

A It was put out - - I saw some in the downtown area.

Q Downtown Mobile?

A Right.

Q Who was putting it out?

A It was - - I didn't see people putting it out.

Q What did it say?

A Basically, if I recall, it accused Bridges of catering to blacks and that he had turned loose some Deputies on some white students at Murphy High School several years prior.

Q All right. That was Sheriff Ray Bridges in race for County Commission?

A Right.

Q All right. By the way, Counsel, you explained the outcome of the Perloff - Buskey race on the basis that Perloff was more qualified than Buskey for the position.

A Qualified for what?

Q For State Senator.

A You mean to represent the blacks?

THE COURT: No, to represent the whole county.

MR. WOOD: The most qualified candidate.

A Ask the question again.

MR. WOOD: You said that the race was a factor

in the Buskey - Perloff race, and I suggest to you that couldn't you say that Senator Perloff won, not because of race, but because he was the best qualified candidate?

A No, sir.

Q He was not the most qualified?

A No. The most qualified candidate doesn't always win.

Q You think Buskey was the most qualified candidate?

A No, sir.

Q Senator Perloff served eight years in the Alabama House of Representatives, didn't he?

A That is correct.

Q He was a lawyer, wasn't he?

A That is correct.

Q It does help being a lawyer in the legislature, doesn't it?

A Yes, sir.

Q Mr. Buskey was a school teacher.

A That is correct.

Q Some people could say that the reason Senator Perloff won was because he was the best candidate.

A You could say that. I wouldn't say that. I would say Perloff won because he ran a better campaign.

Q Okay. Then, you discussed about - - you gave us your idea of some of the particularized interests of blacks

A Well, almost always.

Q All right, sir.

THE COURT: All right. Let's take a 15 minute break.

(R E C E S S)

THE COURT: All right. You may proceed.

MR. WOOD: Mr. Kennedy, as a lawyer, you know there is no constitutional right for blacks to be elected to public office, don't you?

A Yes, sir. I have heard that argument.

Q You have heard that argument?

A Yes, sir.

Q Now, what is the Voter Registration Organization?

A This is an organization in Pritchard that attempts to get blacks registered to vote and whites also.

Q It endorses candidates?

A Yes, sir. It endorses candidates.

Q Does it do the same sort of thing as the Non-Partisan Voters League?

A I am not sure. I am not a member of the Non-Partisan Voters League.

Q It endorses candidates in the City of Mobile legislation and county-wide elections, doesn't it?

A Right.

Q And the local branch of the NAACP out in Pritchard endorses candidates, doesn't it?

A I don't believe so.

Q Doesn't it?

A No, sir. I should hope not, no, sir.

Q Do you belong to that?

A No, sir.

Q Now, you don't know of any exclusive white organizations that have that sort of set up like the Voter Registration Organization and the Non-Partisan Voters League?

A If there was a white organization that did that, I wouldn't know.

Q You don't know of one, do you?

A No, sir.

Q All right. Now, do you know Leila G. Brown?

A No, sir.

Q The Plaintiff in this case?

A No, sir.

Q How about Mary Louise Griffin Coley?

A No, sir.

Q How about Joanie Allen Dumas?

A No, sir.

Q Do you know Elmer Joe Dailey Edwards?

A No, sir.

Q How about Rosie Lee Harris?

three.

Q But you knew it in the beginning?

A Yes, sir.

Q But, then, all of a sudden, the second time around, that became a reason you voted against it?

A One of the reasons, yes.

Q And the other two - -

THE COURT: Let's don't go back over them. I have heard them. Well, ask him about them.

MR. PHILIPS: I intend to, Your Honor.

THE COURT: Let's don't ask him to recite them.

MR. PHILIPS: One of the other reasons that you recited was that you had been, and this is the language of your testimony as near as I could get it, that you were led to believe that the Mobile County School Board was created by a constitution amendment and could not be changed by a local act; is that your testimony?

A Yes, sir.

Q Okay. Was the bill you introduced the first time a local act?

A Yes, sir, it sure was.

Q All right. Who led you to believe this?

A After research, I discovered that there was a question as to whether or not it could be done.

Q By local act?

A Yes, sir, but local act.

Q All right. Did someone - - did you discuss this with anybody or did you discover this completely on your own?

A No, sir. Someone else discovered it.

Q Who discovered it, Mr. Kennedy?

A Mr. Dan Alexander. I believe I got that from him.

Q Okay. Mr. Alexander told you that the legislature - -

THE COURT: Is that a member of the School Board you are talking about?

A Yes, sir. I think the information got to me that the School Board was going to attack the bill on that basis; that we couldn't redistrict the Mobile County School System because it was created by a constitutional amendment. That was the basis on which I believe that the bill was going to be attacked initially.

MR. PHILIPS: The bill was going to be attacked. I am talking about the second bill.

Now, are you telling us that the second bill, the School Board told you that they were going to attack the second bill?

A No, sir. The first bill. I got that information from somebody that had to do with the attacking of the

first bill. It was my information that they were going to attack the bill initially, the first bill, on that basis.

Q Because it was being changed by the passage of a local act?

A Yes, sir.

Q Okay. The second bill wasn't a local act, though was it?

A No, sir. It was a local act. It was a general act of local application.

Q There is a difference between a local act and a general act of local application and the second bill was a general act of local application.

A Yes, sir.

Q That was designed to get around the probability of attack because it was a local act.

A I don't know, but it could have been.

Q Okay. Then, the other reason, the third reason that you gave us, you said that there was some technical defect in the bill, or that might have been the same reason we have just been discussing.

A It may have been, but I think the defect was it was a bill based on a population basis, yet, in the body of the bill, it was, of course, formulated on districts.

Q Well, was this a defect that could have been procured by an amendment to the bill?

A I don't believe so, no, sir.

Q You don't think so?

A No, sir.

Q You don't think there was any probability, then, of procuring a legislative act that could be, in proper form, be enacted by the legislature?

A Dealing with - -

Q With the subjects we are talking about.

THE COURT: The School Board.

A I am in doubt as to whether or not - - it is my feeling, as I said, that the legislature, according to the Constitution of the State of Alabama, can not do anything to the Mobile County School Board except by a constitutional amendment.

Q That is your opinion?

A Yes, sir.

Q That is the reason you opposed, then, your second bill?

A One of the reasons.

Q One of the reasons you opposed the second bill?

A Yes.

Q Okay. If the legislature couldn't properly do anything about it by enacting an act, Mr. Kennedy, why was it necessary to oppose enactment?

A I am sorry, sir.

Q Do you deny making it?

THE COURT: He says he doesn't recall. That is it If he doesn't recall, he doesn't recall.

MR. PHILIPS: Your Honor, I have no further questions.

THE COURT: Mr. Blacksher?

MR. BLACKSHER: No further questions.

MR. WOOD: Judge, one question, please.

THE COURT: All right.

RE-CROSS EXAMINATION

BY MR. WOOD:

Q Mr. Kennedy, do I remember correctly, didn't you state that there was no racial campaigning in the Buskey - Perloff Senatorial race?

A I think I stated there were no racists campaigning in the Buskey - Perloff race.

Q There wasn't any racial campaigning in that race, was there?

A I believe I testified there were no racists campaigning. The mere fact that race entered into the thing; Buskey is black and Perloff is white.

Q What I mean is Senator Perloff wasn't going around saying, "don't vote for my opponent because he is black." He wasn't doing anything like that?

A No, sir.

Q And Mr. Buskey didn't have any hand-bills or things saying black people got to stick together and vote against the white man. There wasn't anything like that, was there?

A No, sir.

MR. WOOD: That is all.

THE COURT: All right. You may come down.

Whom will you have next?

MR. BLACKSHER: Your Honor, I apologize to the court. I had misplaced to the court with my introduction statement about Mr. Cooper.

THE COURT: All right.

GARY COOPER

the witness, having first been duly sworn, to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

Q State your name and address, please, sir.

A Sir, my name is Gary Cooper and my address is 1208 Palmetto Street, Mobile, Alabama.

Q Would you give us a resume of your formal education?

A Yes, sir. I attended grade and high school in Mobile. I have a B.S. Degree of Finance from the University of Notre Dame and studied on the graduate level at the George Washington University in Washington D.C..

Q Were you born and raised in Mobile?

A I was born in Louisiana and came here within the first year of my life and I was raised in Mobile.

Q Are you presently an elected official in the legislature of Alabama?

A Yes, sir, I am.

Q From what district?

A District 103, sir.

Q You were elected in 1974.

A Yes, sir.

Q From a single member district?

A Yes, sir.

Q How long have you been involved actively in Mobile County politics, Mr. Cooper?

A I believe, sir, the first race that I worked in was probably in '69 or '70.

Q Which race was that?

A That was the Jackie Jacobs race for the School Board.

Q That would have been 1970, I believe.

A Probably. I am not sure whether it was '69 or '70.

was a factor?

MR. PHILIPS: Your Honor, excuse me. It seems to me the question, where race was a factor, is a bad question, unless we define it a little closer. What is meant by where race was a factor in the campaign?

THE COURT: You have an opportunity to cross-examine him.

MR. BLACKSHER: Let me withdraw the question.

I will start with the Jackie Jacobs campaign. Will you describe her qualifications for that office?

A As I remember, she was, I think, an instructor at a local junior college and had done a certain amount of work on her Doctorial Degree. She was a very articulate, well-spoken, attractive candidate and probably, in my opinion, more qualified than any one else that has sat on the School Board.

Q In fact, she has earned her Ph.D. since that time.

A Yes, sir.

Q Could you describe how her race specifically became a factor in her campaign for the School Board?

A Yes, sir. In my opinion, from the initiation of the campaign that it was very obvious, because of her appearance, that she was a member of the black race. Because of the fact she had to run in a system that required

at large, and because of the polarization of the vote, she did not receive hardly any of the white vote and consequently lost.

Q Who were her opponents in the May Primary - - strike that - - yes, 1974?

A I remember one opponent as Dr. Norman Berger. I don't remember if there were other opponents.

THE COURT: Is he an M.D. or a Doctor of Philosophy, Dr. Berger.

MR. PHILIPS: Your Honor, he is a dentist.

THE COURT: All right.

MR. BLACKSHER: Mrs. Jacobs was defeated in that campaign, correct?

A Yes, sir.

Q Are you aware of what kind of vote returns she got?

A If I remember, and this is somewhat hazy, I believe she may have barely gotten in the run-off, but she was very soundly defeated in the final election, sir.

Q Was the next campaign you were involved in that of your brother's in 1972 - -

A I believe so, sir.

Q Mr. Cooper, tell us to what extent your brother's race was a factor in his campaign in Pritchard.

A Your question was, in what fact race was a factor

in his campaign?

Q Yes, sir.

A It was the most important factor, because of the fact he had to run at large, and because of the prior administration and the political set up, 99.9% of the election officials in the City of Pritchard were white.

People were harassed at the polls. They had a difficult time voting and challenging ballots and, at the polling place, where there appears to be a heavy black turn-out, many methods and ways were found to cause delays and so forth.

Q What was the percentage of the registered voters who were black in the City of Pritchard, at the time?

A If I remember, it was - - in the Primary - - I believe it was closer to 50 - 50 or maybe a slightly smaller number of black voters.

Q Did the campaigners make a concerted effort to get more blacks in the City of Pritchard to register to vote?

A Yes, sir, a very concerted effort.

Q Tell us some of the things, some of the ways you encouraged and actually helped black citizens to register to vote prior to the election?

A We had a strong voter registration drive in which we literally used young people and old people alike and

knocked on doors and arranged transportation to pick people up and actually carry them down to the Mobile County Courthouse to get them registered. We did this as long as we could prior to election day.

Q Did you have any difficulties getting these black voters registered? Did you encounter any impediments or barriers there at the Courthouse?

A Yes, sir. At that time, the Board of Registrars were somewhat hostile to our efforts, and people had to wait in long lines and they made it more difficult than it could have been.

Q What efforts did the campaigners make to get the vote out, to get the vote out particularly in the black community of Pritchard?

A Yes, sir. We encouraged the ministers in the community to make announcements after their church services We knocked on doors in the early mornings. We put campaign material, you know, on the front porches. We provided transportation and, prior to election day, we had motorcades and used the normal, you know, procedure to encourage people and get them excited about an election.

Q Did the returns show that you were successful in turning out a large portion of the black voters in Pritchard?

A Yes, sir, a reasonably large vote.

Q And your brother was successful in that race?

A Yes, sir.

Q And was elected Mayor of Pritchard?

A Yes, sir.

Q And recently re-elected?

A Yes, sir.

Q Were you involved, in any way, in his most recent campaign, 1976?

A Only in a minimal amount, sir.

Q Were you close enough to it to tell us whether the percentage of black registered voters has changed since the '72 campaign in Pritchard?

A Yes, sir. It has increased somewhat.

Q Do you have any estimate to the degree to which it has changed?

A I am not certain as an exact figure, but I would say maybe 2 to 3%. Certainly, no more.

THE COURT: In other words, blacks have a slight majority now?

A I would think possibly, sir.

MR. BLACKSHER: With respect to the white candidates that - - whose campaigns you were involved in, would you tell us whether or not they sought the vote of the black community throughout Mobile County or throughout the City of Mobile?

A Yes, sir, they did.

Q Tell us how they went about seeking the vote of the black community.

A They went about it normally by contacting individuals in the community that they thought were influential and attempted to get their help in getting other people to vote for them.

Q Were there certain things that the campaign strategists avoided doing to make known to the white community the attempts of these candidates to seek actively the black vote?

A Yes, sir.

Q Would you describe what they were?

A I think one obvious thing is that in most of the campaigns they did not publicize or publish the fact that they had, in fact, active campaigns going in the black community.

Q Why was that?

A Well, because in the community in which we live, there is still a great deal of racism, and they, I think, very accurately analyzed that if the white community knew that they were catering to the black vote they would lose a great deal of the white vote.

Q Some people in this courtroom, Mr. Cooper, have suggested that things have changed since 1970 and the late 1960's, and that race in the electorate is not the factor

that it was during the 60's any more. What is your opinion about that?

A I think they are gravely misinformed, sir.

Q Can you support that with - - what is the reasoning for your opinion?

A I think that we only need to look at election results and the methods in which people conduct their campaigns.

Q How do you mean?

A Well, let's take the Mayor's race in Pritchard and we look at the results. From Eight Mile, which is a section that is predominantly white, and I believe in that section, Mayor Cooper received approximately 85 votes and his opponent received 800, something like 10 to 1.

Q Mr. Turner?

A Yes, sir. I think that if we looked at other races we will, you know, see clearly that that is the case in other races too.

Q In fact, it was the case in your race against Mrs. Edington for the House Seat in 1974.

A Yes, sir.

Q There was a highly polarized vote in that race as well.

A Yes, sir.

Q You and Mrs. Edington, by the way, made a very

conscious effort not to make race an issue in the campaign.

A That is right. We did, sir.

Q Do you consider there are particular issues that concern the black community with respect to politics in particular, that particularly concern the black community as opposed to the white community?

A Absolutely, sir.

Q Tell us what they are.

A I think the issues that would particularly concern the black community are those of the service that are provided by our municipal and county government, the reaction of School Boards to schools that are located in the predominantly minority community.

I think the fact that we have an inordinate amount of job discrimination in our fire department, our police department, in all areas of our municipal and county services. These are items that would predominantly concern the minority community.

Q What kind of discrimination are you talking about in the fire department?

A Well, I think they combat fires, but the type discrimination I am speaking of is that currently the fire department has employed 490 people. Of these individuals 97% of them are white.

A recent check with the Personnel Boards tells

me that a minority has not been hired in the Mobile Fire Department since November 16 of 1971.

MR. PHILIPS: Excuse me, if I might interrupt briefly, and object to this line of questioning. This is purely a municipal matter. The city fire department has no relationship to the School Board or the County Commission, and I don't think this testimony as any place in this proceeding.

THE COURT: I think it is relevant as to the white power structure in reference to black needs.

Go ahead. The City of Mobile is part of Mobile County.

MR. BLACKSHER: Mr. Cooper, do you get complaints from your constituents with respect to matters of School Board concern?

A Yes, sir, very frequently.

Q Do these complaints come from black citizens throughout Mobile County, not just in your district?

A Yes, sir.

Q Could you tell us about some of them?

A Yes, sir.

Q The nature of some of them?

A I think a perfect example might be a school by the name of Dunbar, that is located in my district.

Q That is a middle school?

A That is a middle school.

Q One hundred percent black enrollment?

A Yes, sir.

Q All right.

A If we drove by Dunbar today, as I just drove by, you would find the grass approximately three feet high. If you walk in the auditorium, there are no curtains in the auditorium. If you walk through the hall, you find the walls chipping and breaking, and it is very evident that few visit - - I have always been out to speak at a class. Maybe Scarborough; is that the name of the school here?

MR. BLACKSHER: Yes.

A I have been maybe to that school or to another school, and there is a very visible difference in the type maintenance in the schools.

Q Scarborough is a predominantly white school?

A Yes.

Q In a white neighborhood?

A Yes. If you look at the gounds upkeep, it is very evident. I would also venture to submit that the few times that I have visited Barton Academy, and I look at the racial balance of the people who are employed at Barton Academy, you would almost think they lived in an all white community.

Q Have you received complaints from teachers?

A Yes, sir.

Q Would you describe what they are?

A Well, I think my predominant complaint - - I get many calls from many teachers who tell me they must travel to Demopolis, Alabama and to Florida and other places to teach school when they are familiar with white citizens getting jobs who have applied after they have applied.

Q When you get these kinds of complaints, how do you deal with them, if at all?

A Normally I call - - is it Dr. Le Destro, and prior to that, Dr. Collins.

Q The Superintendant of Schools?

A And I discuss it with them.

Q What kind of problems come to you as a black representative that are of concern to the Mobile County Commission?

A I am trying to think of those specifically. I think one very evident one is the fact that the Mobile County Commission played a very big part as being the prime sponsors of the Ceta Consortium, which was set up under the Comprehensive Employment and Training Act in which there was a tremendous amount of discriminatory practices going on and I, on many occasions, spoke with Commissioner Yeager and Commissioner Cory Smith about these discriminatory practices and in each case to no avail.

Q You are going to have to tell us what you mean by discriminatory practices?

A Funding programs that directly effect an minority community. Hiring individuals of their choice rather than the best qualified individual.

Q Who might be black?

A Who happened to be black.

Q Since you have been in the legislature, Mr. Cooper, have you seen any evidence that black and white legislators are consciously aware of the fact that the at large election system in Mobile County has on the ability of blacks to get elected?

A Yes, sir.

Q Could you tell us what you have observed that leads you to that opinion?

A Well, I think, first of all, the fact that we have been elected and we are there and the fact that our vote can have some influence on what goes on, you know, in our local community.

Q You mean you were elected from a single member district?

A Yes, sir.

Q You introduced, didn't you, a bill to modify the Mobile County Personnel Board; is that correct?

A Yes, sir.

MR. PHILIPS: I still would like to make my objection.

THE COURT: Your motion is denied.

MR. BLACKSHER: Mr. Cooper, since you have been in the legislature, have you been able to observe whether or not the members of the Mobile County delegation in the legislature are aware of the effect the at large system for County Commission and the School Board has on the voting strength of blacks in this community?

A Yes, sir, I have.

MR. WOOD: Your Honor, I object to that question This calls for expert testimony that this witness is not qualified to give.

MR. BLACKSHER: Your Honor - -

THE COURT: Go ahead.

MR. BLACKSHER: Your Honor, I am asking this legislator for his perception and the perception of his co-legislators concerning what effect the at large system has. I want to know what is in their mind and what they discuss. This goes simply to the question of intent that is raised by the Defendants in this matter. Is the legislature aware of the effect of the at large system which it has maintained on the voting strength of blacks in this community.

MR. WOOD: Judge, I object on the grounds of

heresay.

MR. PHILIPS: Your Honor, he is asking the witness to testify to the mental operation that is in the minds of other witnesses not before the court.

MR. BLACKSHER: Your Honor, I am simply asking for this legislator to relate what he has heard, what conversations he has engaged in, not necessarily for the purpose of revealing the truth, but for the purpose of simply revealing that they were made.

THE COURT: Overruled and let the answer in.

MR. BLACKSHER: Do you understand the question?

THE COURT: Read it back to him, Mr. Reporter.

(Whereupon, the last question was read by the Court Reporter.)

A Yes, sir, I am. There is little doubt in my mind, or there is absolutely no doubt that each member of our delegation is aware of the effect of the at large system and the reason I am so sure of this is, whenever we discuss the writing, or the drafting of a piece of legislation that will, in fact, break down Mobile County into single member districts, there are many questions that other legislators ask about how many blacks will this result in and should there be a drawing that will result in more than one, or more than two. The reaction

comes out relatively negative. So, they are, in fact, aware.

MR. WOOD: Your Honor, I would like to call the court's attention that Dr. Cotrell is sitting in the courtroom. As I understand it, we had designated our expert to sit with us.

THE COURT: Yes. Where is Dr. Cotrell. Step outside, please, sir.

MR. BLACKSHER: We apologize, Your Honor. You may continue, Mr. Cooper, if you weren't already through with your answer.

A I think that was basically my answer.

Q What bill in particular have come up since you have been in the legislature that would have provided single member districts in the county?

A Well, the one that immediately comes to mind, of course, was the bill we originally passed re-districting the Mobile County School Board.

Q That was in 1975?

A Yes, sir.

Q Was there also a bill to re-district the Mobile County Commission in 1975 that did not succeed?

MR. KENNAMER: I object. He is leading him. He could ask him if a bill came up. He makes a statement that such a bill came up and then said didn't it.

THE COURT: Yes. Rephrase your question.

MR. BLACKSHER: Yes, sir. Was there another bill concerning the Mobile County Commission?

A I believe so, sir.

Q What about in the most recent session of the legislature, the 1976 session?

A The only one I remember is the School Board.

Q Who introduced that bill?

A Representative Cain Kennedy.

Q I am talking about in the 1976 legislative session, the one most recently ended.

A I remember there were two bills introduced in relation to the School Board. Representative Kennedy introduced the first and, the second one, Representative Sonnier introduced it. I believe Sonnier's was in the '76 session and Kennedy's in the prior session.

Q Do you recall how you voted with respect to Representative Sonnier's bill in the House?

A If I remember correctly, we did not have an opportunity to vote on that bill.

Q What is your best recollection of what happened to that bill in the House?

A As I recollect, Representative Sonnier indicated that he desired to introduce the bill, and he consulted with Representative Kennedy and myself, and we indicated

that we would, in fact, protest the bill or contest the bill and that, in fact, would have kept it from passing.

THE COURT: I am not sure I understood what you said. You said you would contest the bill?

A Yes, sir.

THE COURT: You would oppose it?

A Yes, sir.

MR. BLACKSHER: You don't recall if the bill came up for a vote of some kind within your committee or delegation?

A I don't think so, sir, because it was, if I remember, introduced first and - - I am trying to - - I must admit I don't recollect the exact steps that it went.

I do know that Representative Sonnier consulted with me and I indicated I would not support the bill.

Q Do you recall why you were opposed to the bill?

A Yes, sir. First of all, we passed a bill once before that said almost exactly the same thing. That, in my opinion, had been legally advertised and had been opposed and killed, as I understand it, through efforts of the Mobile County School Board.

Okay. It had been advertised. So, the bill that Representative Sonnier, at the request of the Mobile County School Board, all of a sudden one day presented to us was a bill that was so designed, if I remember correctly, to be

a general bill of local application which meant that it did not have to be advertised. I felt, first of all, that the bill should be advertised before we acted on it after the one was previously defeated.

We did not have enough time left in the legislative session for the bill to be advertised, and I also felt that it was a ploy being used by the Mobile County School Board so that they could come back and tell the Judge here in Mobile that we were trying to get a bill passed. Of course, we know that if the bill passed the House, no one knew what would happen to it in the Senate, and if the Senate passed the bill, it could be challenged, and it could mean another two or three years before any result could come of this problem. Those were the reasons I was opposed to it, sir.

Q Mr. Cooper, so long as the Mobile County Commission and the Mobile County School Board are elected at large in the county, would you consider offering yourself as a candidate for either of those bodies?

A No, sir.

Q Tell the court why not.

A I think, that being a member of a minority race, that it would be almost impossible for me to raise the large amount of sums necessary to run an at large race, and I think, because of the racism composition of our total popu-

lation here in Mobile County, that it would be impossible for me to garner the number of votes to win, even if I could raise the money.

Q Finally, Mr. Cooper, I believe Friday you were talking briefly about your participation in Mayor Cooper's, your brother's, 1972 campaign for Mayor of Pritchard, and you were telling us about some of the difficulties that you and other campaign workers encountered at the Courthouse attempting to have black citizens of Pritchard registered.

Did you also encounter some difficulties on election day at the polling place in Pritchard?

A Yes, sir.

Q Would you describe them, please?

A Yes, sir. I was the chief poll watcher for my brother's campaign on election day at Pritchard City Hall where the election boxes were located. Before we went to the polls to work that day, we had a number of classes, and we, of course, were briefed on what the current election law was and we ran - - well, throughout the day, we ran into what we considered to be violations of the law.

If not overt, there were those that were very devious, such as excessive delays to allow people to vote their challenging vote, assisting people when there were a large number of blacks standing in line, individuals would go out and call the whites out of line and lead them to the back of the

polling places where they could vote and leave, and it was so obvious on that election day in Pritchard, sir.

Q What about the challenge ballots. What difficulties did you have with the black voters who sought to cast challenge ballots?

A The system that was used, when an individual came up to vote, they had to fill out a challenge ballot certification, and someone had to vouch that they, in fact, knew an individual and knew that individual lived at a certain address, and should there be an individual who may have lived in a community and who knew three or four people, the election officials at that election would only let you vouch for one person. So, that created a great deal of delay.

Then, there was - - there were only - - the number of people working at the challenge voters table were only two, regardless of how long the line got. When there got to be six hundred people in line, there were still just two people there handling them, and it took an excessive amount of time.

MR. BLACKSHER: No further questions.

THE COURT: You may cross-examine him.

CROSS-EXAMINATION

BY MR. KENNAMER:

Q Mr. Cooper, how old are you?

before she and Senator Edington married?

A Only when I read her resume in the newspaper, sir.

Q Now, when you - - did anybody else run in that campaign besides you and Mrs. Edington?

A No, sir.

Q Was race a factor in that campaign?

A Yes, sir.

Q Who made it a factor?

A I think probably the racist social system under which we have lived for years.

Q You made it a factor too, didn't you, Mr. Cooper?

A By being black, sir.

Q You know that 65% of that district is black or was black in 1974.

A I think population wise that is probably correct, sir.

Q And you got the message over to them that you were a black and that blacks should support the black, didn't you, Mr. Cooper?

A If that message was gotten over, it was not intentionally gotten over by me, sir.

Q Did you run any pictures on posters or in the newspaper or anything showing pictures of you and your family?

A I remember running a picture of myself on posters.

ation?

A I received dual support with my opponent. Both of us were endorsed.

Q Did you receive endorsement and support of the Teamsters Union?

A Yes, sir.

Q Did you consider that support important?

A Not necessarily, in my district, sir.

Q Did you receive the endorsement and support of the Non-Partisan Voters League?

A Yes, sir.

Q Did you consider that support important?

A Reasonably, sir.

Q Did you receive endorsement of the Mobile Press Register?

A Yes, sir.

Q Did you consider that endorsement important?

A That is questionable, sir.

Q Now, asking you a question again about these bills that Mr. Kennedy and Mr. Sonnier introduced, was the Kennedy bill a local bill?

A As I remember, it was a local bill, sir.

Q All right. You do understand the significance between the - - and the difference between local bills, and general bills, and general bills of local application.

don't you?

A Yes, sir.

Q Was the Sonnier bill drawn as a local bill or was it a general bill with local application?

A As I remember, it was a general bill of local application, as drawn.

Q All right. Now, the constitutional prohibition that proved the downfall of the Kennedy bill, or the constitutional requirement of the Alabama Constitution having to do with advertising, which requires advertisement of local bills, that same requirement doesn't apply to general bills, does it?

A Not to my knowledge, sir.

Q All right. Now, in your experience in your work with your brother's campaign for the Mayorship of Pritchard was part of your function to attempt to get people to vote for your brother?

A No, sir.

Q Okay. What was your function in that campaign?

A I worked primarily as a fund raiser and, secondarily, as an individual who worked at the polls on election day.

Q All right. During the course of the campaign, I believe you said you made - - the campaign made extensive efforts to register black people to qualify them to vote.

A Yes, for the government's resolution, change of government resolution.

THE COURT: All right. You used to determine the coefficient, was the "R" square method that you used?

A Yes.

THE COURT: The middle column, was that the vote cast?

A No. That is the income per capita in that ward.

THE COURT: All right. You may come down.

MR. BLACKSHER: It is all right to excuse Doctor Schlichting?

MR. PHILIPS: Yes, sir.

MR. WOOD: Yes.

THE COURT: Call your next witness.

CHARLES L. COTRELL

the witness, having first been duly sworn to tell the truth, the whole truth and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. STILL:

Q Mr. Clerk, would you hand the witness Exhibit No. 60, please?

May it please the court, this is Charles L. Cotrell. He lives at 210 King William Street in San Antonio,

Texas. He is thirty-five years of age.

He received a B.A. and a M.A. at St. Mary's University in Texas. He received his Ph.D. at the University of Arizona.

He is married and has two children. He is an Associate Professor of Political Science at St. Mary's University in San Antonio.

Dr. Cotrell, is that information correct?

A Yes, it is.

Q Would you look, please, at what has been marked as Plaintiff's Exhibit No. 60?

A Yes.

Q Is that a resume?

A Yes, it is.

Q What is the date on that resume?

A This is December, 1975.

Q Is anything significant that has happened in your life to change that resume since that time?

A I have had a birthday.

Q All right. Other than that is the resume substantially correct?

A Yes, it is.

MR. STILL: Your Honor, the resume shows that Doctor Cotrell, as we have pointed out, is an Associate Professor of Political Science and it shows that he has

testified as an expert in voting cases in Texas, Louisiana and we move his admission as an expert witness for the purposes of political science and analysis of voting behavior.

THE COURT: All right.

MR. STILL: I would like to move the introduction of Exhibit No. 60, which is his resume.

THE COURT: All right.

(Plaintiff's Exhibit No. 60 was received and marked, in evidence.)

MR. STILL: Now, Doctor Cotrell, in your role as an expert for the Plaintiffs in this case, what sort of background work have you done in the Mobile area to prepare for your testimony today?

A I have examined the regression analyses that were talked about earlier in this courtroom. I have interviewed some twenty or more politically active individuals, office holders, non-office holders, candidates, also rans and just generally politically knowledgeable people.

I have read the depositions in this case. I have sat through and taken part in the city portion of this case and I have also examined the raw vote totals presented to me.

Q Did you also examine the computer print-outs, the

regression analysis?

A Yes. I said that I did.

Q Excuse me. I must have missed that.

Now, what does the term voting dilution mean to you as a political scientist?

A Voting dilution is a phenomenon which usually occurs in an at large election structure wherein an identifiable voting group vote is submerged or cancelled consistently at the hands of a voting majority other than that group. So that that groups vote or their preference, the groups preference, is not registered in the electoral field.

Q All right. Now, what does the term polarized voting mean?

A It is a dynamic in voting behavior wherein, in races, for example, with black and white candidates or between white candidates, one of whom is favored by the black community, a preponderant - - in preponderant number of cases the vote, voting behavior coalesces along racial lines.

Q All right. Now, going back to voting dilution, what data from Mobile did you examine to determine whether or not voting dilution of the black vote in Mobile exists?

A The informational basis for my opinion concerning the racial dilution where the regression analyses, raw vote

totals, interviews with politically active individuals and an analysis of these phenomenon in three different jurisdictions, city, county and school districts.

Q Mr. Clerk, would you hand the witness Plaintiff's Exhibit No. 9?

Doctor Cotrell, Plaintiff's Exhibit No. 9 has been introduced. I believe it is the Voyles thesis and analysis of Mobile voting patterns from 1948 to 1970. Have you read that thesis?

A I have read Doctor Voyles' thesis.

Q Did you consider the information that he had gathered and conclusions that he had gathered in making your decisions about Mobile?

A Yes, I did.

Q All right. Now, on the basis of all of this information that you considered, in your opinion, does there exist in Mobile, in Mobile County, voting dilution of the black vote?

A In which elections?

Q Well, let's take them one at a time.

Let's take the School Board elections first. In terms of School Board elections, does voting dilution exist?

A It is my opinion that racially - - dilution does occur in School Board races. yes.

Q On what do you base that opinion, specifically?

A I base that on the examination of the regression analysis, interview data and some familiarity with the raw vote totals.

Q Now, as far as County Commission elections go, are you able to conclude that voting dilution does exist with respect to County Commission elections?

A It is my opinion that delusion does occur in the County Commission races and has occurred and I base that opinion upon the regression analysis and examination of the raw vote totals and also interview data and the existence of racially polarized voting and dilution in other than County Commission races.

Q Now, what were those other than County Commissior races?

A Well, for example, in the '60's, a person by the name of Montgomery, a black candidate, ran county-wide and was soundly defeated. Also the school district races are county-wide and, of course, the city is subordinate to or is consumed by the county.

Q All right. Now, in terms of political analysis, is it consistent with good political analyses to make those

A An opinion concerning delusion must be reached on the basis of information in the jurisdiction at hand, the county, the city, the school district.

It would be less secure an opinion, for example, about county races exclusively by an examination of school district races, although those races are county-wide. However, I think common sense instructs us that although the issues and candidates are different and the level of office is different, many of the voters are the same in these overlapping jurisdictions and, therefore, delusion and racially polarized voting in one area would, at least, lend suspicion to the existence of dilution in another area.

Q All right. Now, there is some evidence before the court now and some exhibits that I would like to show you. Mr. Clerk, would you hand Exhibits 3 and 4 to the witness, please.

Doctor Cotrell, have you ever looked at those particular exhibits before?

A Yes, I have, during the course of the city case.

Q All right. Now, taken individually, those exhibits show that in certain selected wards which are designated as predominantly black, that there is a lower turn-out of voters than there is among other selected wards which are designated as predominantly white.

A That is correct.

Q Do you have sufficient data to draw a conclusion about the possible reasons for this lower turn-out?

A I can offer an opinion on those reasons. I haven't examined the entire political and legal structures in the history of Alabama nor in Mobile, but, for example, in House District 99, you have.- - well, beginning with School Board race Gill - Alexander run-off, you have a black candidate and a high response, apparently from the predominantly black wards in the turn-out.

One credible view would be that the existence of black candidates does spur turn-out. Another credible view would be that long term exclusion from the political process may, indeed, result in differentials in turn-out among blacks and whites and, indeed, make it more difficult in the long run for black voters as it were to catch up in turn-out.

Q Now, let's turn for a moment to a hypothetical. If I propose to you the theory that the 1960's elections in Mobile County and the City of Mobile may show a polarized vote and a dilution of black votes, but that since about 1970 things have changed dramatically in our society and that there no longer is that type of dilution and polarization; what would be your reaction to that, based on the evidence that you have before you?

A Well, I would disagree with that particular hypothetical or the content of that hypothetical, because there are regressions. Regression analysis demonstrates that

there is racially polarized voting and I think competent racial dilution in the '70's here in Mobile.

Secondly, literature in the field, in this region and nationally, suggests that race is still a very salient feature and influence in voting and as late as 1975, in a work about the South as a region including Alabama, one author, Newman Bartley suggests that race maintains, with what he calls a perverse persistency, so my reaction to the hypothetical that you gave me is that race is and can be a salient influence in Mobile elections.

Q All right. Now, what does the term pivotal vote mean to a political scientist?

A Not boring in on any particular formulation of the pivotal vote theory, I think it could be taken to mean an identifiable voting groups position in the electorate of sufficient number whereby the group can pivot or turn an election around, decide it out, tilt the scales one way or the other.

It is surrounded by numerous assumptions about the behavior and capabilities of that particular group and their place in a general electorate.

Q Are you familiar with the process by which the Declaration of Independence was adopted?

A In what regard?

Q Have you studied that lately?

A Yes.

Q Okay. In that case there was a pivotal vote by one delegate from the state of Pennsylvania, wasn't there, out of three votes?

A That is correct.

Q That caused Pennsylvania to vote for the Declaration of Independence.

A I think that is correct.

Q Now, that is a very small example, one vote out of three, being a pivotal vote.

Are there any particular limits on the size of a pivotal vote?

A Well, your question is very general. In pivotal vote theory you think you are dealing with a group, not three of us in a room, one of whom has the balance of power.

I was describing pivotal view. I wouldn't call it a theory in the context of voting behavior in groups, not as it were a three handed card game.

Q All right. Now . . . . . .

THE COURT: Is pivotal vote to you equated with the commonly used term of swing vote?

A Your Honor, if you mean does one group have the capability, conscious capability, of throwing the election to one candidate or another, yes.

THE COURT: All right.

MR. STILL: Now, Doctor Cotrell, does a pivotal vote have to have voting cohesion among the block that is the pivot or the swing vote?

A Yes. That cohesion would vary. You have to have cohesion, hence the group recognizable and the pivot.

Q Now, you also used the term, in responding to His Honor's question, and I think you called it conscious cohesion or conscious realization or something like that.

What do you mean by that term?

A Well, I think that the voting group, in order to - - according to Harry Holloway, a scholar at the University of Houston - - in order to maximize their position there has to be an awareness that, indeed, this group is, quote, "swinging an election", unquote, or pivoting in a pivoting position and thereby are in a bargaining position in an election.

It wouldn't be clear to say the degree of knowledge throughout the group. It might be leadership. It might be the entire group, but under the pivotal notion does assume some awareness that the group in question is, in fact, swinging the election and then it - - and of course, there is one other consideration in the pivotal vote theory and I think an office holder, an also ran, a candidate, would be the most aware of this consideration and that is

in election after election, does the group have enough votes? If you subtract them or add them to the winner to have made any difference anyway. Now, that seems to be crucial to a pivotal vote view.

Q With particular reference to the County Commission races, did you analyze the data that I supplied you, which we, in turn, got from Jack Friend about the difference between the black wards, predominantly black wards, and the population, at large?

A So that the court is aware, the data, in question I believe, is basically raw vote totals.

Q Right.

A In County Commission races roughly, as I recall, from 1960 - 1972 and I did examine that data.

Q All right. Did you find any instance in which the total black vote for a particular candidate swung an election?

A In the 23 races I examined, including primaries, run-offs and the general elections, I found no instance where, if you subtracted the black vote total in the predominantly black wards, it would have swung an election.

As I recall, there was one very close instance that the black vote in the Friend information varied from 1 to 7 or 8,000 votes and, of course, it was always split among various candidates, but the crucial question is

whether when you subtract that vote total in the election I examined, whether you would have won an election or lost an election because of the black vote.

Q All right. Now, one more factor about pivotal votes.

Is it also necessary if you have any pivotal vote that the other, the non-pivotal people, be fairly evenly divided between the two candidates, the two sides of the referendum issue or whatever it may be?

A Of course. If you merely find that black voters are voting 70% with the winning candidate and the county-wide totals are predominantly white wards are voting 71% with the winning candidate and the winning candidate wins by a 15,000 or 20,000 vote margin, what you have concluded is that black voters voted in that instance like the white voters and I think it is then fair to ask, at that point, so what.

Q Now, on the basis of all the information that you have analyzed, have you found any evidence that black votes are the pivotal vote in Mobile County, Mobile School Board or Mobile City Commission elections?

A In accordance with the data which I have looked at, which I have analyzed, I have not found that to be the case.

Q All right. Now, in your expert opinion, what

will happen to black voting power in the future if we continue to use at large elections for the election of members to the School Board and County Commission of Mobile County?

A It is my opinion that dilution of the black vote will continue.

MR. STILL: That's all the questions I have.

THE COURT: You may cross, Mr. Wood.

CROSS-EXAMINATION

BY MR. WOOD:

Q I believe you stated that if we keep on going like we have been going and the County Commission and School Board elections, at large elections, that the black vote will continue to be diluted; isn't that right?

A That is correct, Counselor.

Q All right. What is your answer for or how would you restructure our election system for say the Sheriff of Mobile County, who runs at large?

A I have no opinion on restructuring the Sheriff's office or the election system underpinning it.

Q All right. The Probate Judge runs at large, the Tax Assessor and Tax Collector. Will people who vote in these elections, the blacks, will their votes be diluted in those cases too?

Q So, you would have to look at the computer print-outs to tell what the predominantly black wards were prior to reapportionment; is that correct?

A I would like to look at the raw vote totals and the computer print-outs and answer that question, yes.

Q Now, the Jack Friend data that you talked about, which was raw vote data on various black wards, I believe.

A Yes.

Q Now, that data didn't necessarily include the total black vote in Mobile County, did it?

A No.

Q As a matter of fact, you can't really tell by looking at the raw vote data on the predominantly black wards whether or not the black vote in those elections was a swing vote or not, can you?

A It comes close to 60% of the total.

Q So, it is 40% in other wards, isn't it?

A That is correct.

Q And it could make a difference in various elections, couldn't it?

A It could.

Q And you don't know whether or not it did, do you?

A The regression anlaysis, however, supports racial polarization.

Q I am not talking about racial polarization.

I am asking you whether or not it is possible or whether or not you have an opinion on whether or not that 40% that is not in those predominantly black wards could have been a swing vote?

A I understand your concern for the limitations of Mr. Friend's data.

Q That is not what I asked you, sir.

I said, can you tell us whether or not the black vote was a swing vote in those elections you saw simply by looking at Mr. Friend's data?

A I can tell you that the predominantly black wards contained in Mr. Friend's data were not swing votes.

Q All right. But if you put them with the other 40% in the other wards they could have been, couldn't they?

A Theoretically or possibly could have been, yes.

Q How much weight did you put on the regression analyses in your analysis of the County Commission situation?

A The racial polarization expressed in the regression analysis was less secure in the county instance than it was in the other two jurisdictions in reaching my opinion.

Q How many County Commission races did you examine in reaching your opinion?

MR. WOOD: So, Doctor Cotrell, the analysis of the elections over the period of time between 15 and 25 years would be the best; isn't that right, be satisfactory?

A Well, in order to establish the existence of a pattern, a longer period of time would be more desirable.

Q Isn't it true that you just analyzed the County Commission elections over a four year period of time from '68 to '72?

A The races examined in the regression analysis, yes. In the raw vote totals, no, and in the interview data, no.

Q All right. Now, what are the criteria you use to reach your conclusion that racial polarization exists in Mobile County? Aren't there three criteria?

A On racial polarization?

Q Yes.

A Well, the regression analyses are their own factual statements. Also the existence of racial campaign data is important and I suppose the perception that racial polarization exists thereby influencing whether or not candidates would offer themselves for office would yet be another important consideration.

Q What did you find on the existence of racial appeals in campaigning in County Commission contests?

A I found in the 1972 race, the Democratic Primary

race between McConnell and Langan, I found the existence of documents that especially attempted to saddle former City Commissioner, Joe Langan, with the block vote.

Q Which is another name for the black vote; is that right?

A Yes.

Q And you found this in ads?

A That is correct.

Q Do you consider that unfair for his opponent to point up that he is getting the black vote?

A In my professional opinion, it is not a question of fairness. It is a question of existence.

Q If Mr. Langan actively sought that vote and secured it, that is a factor you should take into consideration too, isn't it?

A Whether or not it was - - whether or not Langan sought the black vote or whether or not he received it is evidence that, at least, one candidate felt it would behoove him to appeal to racial themes in a recent 1970 election.

Q But you are not saying which candidate it was that did it, are you?

A I am not trying to impute goodness or badness to either Mr. Langan or McConnell, no. It existed. I saw the document, yes.

Q Whether it is an original thought with the interviewee or whether it is a reflection of the thoughts of others with the interviewee as a conduit.

A You try and make determinations like that, yes.

Q Can you make accurate determinations of that nature?

A You can make assessments of each interviewee and what they say and attempt to put together an aggregate or contextual picture that is the basis of a judgment.

Q Doctor, is it your philosophy as in your expert opinion in the field in which you are expert, that black citizens have a constitutional right to a political safe black electorial district that can, in fact, insure the election of black candidates?

A No. It is not my opinion that any group has a constitutional guaranteed right to a so called safe district.

Q Doctor, did you find in the white community anything to approximate the Non-Partisan Voters League Screening Committee for screening political candidates?

A No. I did not.

Q Doctor, can you have a situation where you have delusion in a single member district where you have single member district election systems?

A In the sense that you would have racially polarized voting is a possibility in a single member district. I

THE COURT: I think he means with reference to the racial polarization.

A Right. And my response would be that, in my opinion, the racial polarization still exists in the '70's as it existed in the '60's.

MR. PHILIPS: And the patterns in that respect are essentially the same?

A Well, there is the same kind of evidence available to suggest that it still exists in the '70's.

Q All right. Doctor, did you find that there was racial polarization in any of the School Board races where there was no black candidate running?

A Yes. In the 1972 Jerre Coffler race - - I don't recall the "R" square, but it seems to be high. That race also was accompanied by evidence of racial campaign appeals.

Q Did you find that evidence to follow in any other race?

A Of the races examined?

Q Of the races in which there was not a black candidate.

A The races examined were - - there were five races examined and Coffler and her opponent was the only race wherein two whites ran against each other among those examined.

Q I see. That is the only race you examined then

A It wasn't the next one. It was the next.

Q Why didn't they go to the meeting while you were in the hospital, do you know?

A I don't know.

Q Okay. Now, are you aware of the policy of the Board, Mrs. McArthur, that allows interested citizens and delegations to appear before the Board and address it at any meeting of the Board?

A No, sir.

Q You are not aware of that?

A No.

MR. PHILIPS: I have no further questions, Your Honor.

MR. MENEFEE: No further questions.

ROBERT EDINGTON

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

If it please the court, this is Mr. Robert Edington. He lives at 1220 Selma Street, Mobile. He graduated from Southwestern College in Memphis. He got his Law Degree from the University of Alabama in 1956. He

has been practicing in Mobile since then.

Mr. Edington, were you born and raised in Mobile?

A Yes.

Q How long have you been actively involved, in one way or the other, in the politics of Mobile County?

A The first political campaign I remember going on was with my father in 1938 when he ran for Circuit Judge. Of course, I was just an observer.

In 1958, after finishing law school, I worked on the political campaign of my then partner, Judge Will G. Caffey, in his race for the State Senate.

Q What about yours? I believe you have been elected to the Alabama House of Representatives twice, in 1962 and in 1966, and once to the Senate of the Alabama Legislature in 1970; is that correct?

A That is correct. Of course, I worked, obviously, very hard in each of those campaigns, which were campaigns covering essentially all of Mobile County.

Additionally, I worked on the campaign of Senator Caffey, when he ran for Circuit Judge back in 1962, the same year that I ran first for the State Legislature.

Then, in 1972, I ran state-wide, unsuccessfully, I might add, against Senator John Sparkman for the Democratic nomination of the United States Senate.

In '68 I ran for and was elected to the Democratic

National Convention in Chicago.

Q Okay. Are there any other political campaigns, local political campaigns in Mobile County, that you have been involved with?

A Yes, my wife ran for the State House of Representatives, District 103, in 1974. Then, this year, she ran for the Democratic National Convention from what is essentially the same district, but unsuccessfully.

Q Mr. Edington, in your experience in county-wide politics, is race an issue?

A Well, in every campaign in this county that I have had anything to do with one way or the other, the subject of race comes up. Yes, it is definitely an issue.

Q Would you go so far as to say it was the dominant issue, or would you place another factor above that?

A I would say that it was a persuasive and very important issue. It could be, in any county-wide race, a dominant issue. Quite often it is not, because the candidates themselves and their workers are sufficiently informed, and generally, I suppose you might say, in most cases, not to make it openly a major issue, but it is, without a doubt, a major issue.

Q Well, how does the issue of race come up in these local campaigns?

A Well, there are a number of ways. I would say

many years ago, the late '50's or the early '60's, it is fairly open and that is, if a candidate ran in Mobile County and got solid black support in the Democratic Primary, and remember, at that time, the Republican race really didn't make much difference then, that candidate would have that vote thrown back at him in the case of a run-off, and, in that way, it was an over racial incident. It was perfectly clear to be specific if one got the ward ten vote, which was the Davis Avenue vote, 80 - 90% just solid, then this is going to be used against him and was used against him on many occasions in a run-off.

Q Do you recall a couple of occasions when this was done?

A I can't think of the names specifically of races, but I know from my own knowledge that I have read political ads and seen political hand-bills in this county in the late '50's and early '60's where that was a specific issue, and I do recall one specific race, and that was involving former city commissioner Joe Langan.

Q Which one of Mr. Langan's races are you thinking about?

A I don't recall specifically, but I do know that in one of his races - - of course, he got a heavy vote on Davis Avenue, and an advertisement to that effect was run in the newspaper and hand-bills were put out, yes.

Q Do you recall seeing those advertisements when he was defeated by Mr. Bailey in 1969?

A I dont specifically recall them. I had no reason to particularly notice it.

Q Okay. The implication of your answer is that the issue of race was not brought up so openly any more; is that correct?

A That is correct. It is handled much more subtlely through code words, such as conservative candidate and that sort of thing.

Q It is still there?

A Under the surface it is still there. I think anyone saying differently doesn't know anything about politics in Mobile County.

Q Not every race, in not every race does race surface even subtlely as an issue, I take it.

A That is true. If a white candidate is running against a white candidate, and there is no particular reason to raise the issue, then it is very likely - - quite likely it would not come up, but if a white candidate is running against a black candidate, it would be a very obvious issue. If a white candidate were running against a so-called liberal white candidate, which is a code word in the county for one strongly supportive of black interests, then race would become a very vital issue.

Q In those cases, or in those campaigns where race does become a vital issue, is it necessarily expressed through the ads and speeches of the candidates themselves?

A Generally the candidates of Mobile County, you know, have a fairly sophisticated approach towards elections. Those that have ever been elected either get sophisticated in a hurry or they don't get re-elected. Their workers might put the word out for them in the community or whispered campaigns, surreptitious hand-bills, and conceivably through advertising.

I recall in the Brewer - Wallace race, that is what I would call scurrilous hand-bills had been put out.

MR. WOOD: Your Honor, I object to that. It is not responsive to a question.

THE COURT: All right.

MR. BLACKSHER: Mr. Edington, do I understand you to say anytime a black person runs for office that the race issue is automatically injected into the race?

A Unless there is a situation where there are only two candidates - - well, where all the candidates are black.

Q That hasn't happened except in the recent races out of the single member legislative districts, has it?

A I do not recall any all black race in Mobile County, except in a single member district, yes.

THE COURT: And those districts have a majority black registration.

A To an absolute certainty, those districts have 70 to 80% black registration or black population. I couldn't swear to the registration.

MR. BLACKSHER: Is it considered politically unwise for a white candidate to have black persons displayed prominantly in his campaign organization or among his supporters?

A I would say this. I have never known a white candidate in a county-wide election that had a black campaign political person that appeared at public gatherings or appeared at the campaign meetings. This might be true in state-wide races or national races that this is done, but, in Mobile County races I don't recall ever seeing a campaign chairman or major person in a campaign of a white candidate that was black.

Q Never the less, most white candidates do attempt to get black votes in their campaigns, don't they?

A Obviously they make every effort to get all the votes they can. They do, of course, make a strong overture to the black community, generally the leadership of the black community.

Q Is there a point a which the white candidate, who wants to win a county-wide election, would prefer not

to have so many black votes?

A As I said, my experience in Democratic Primaries back in the late '50's and early '60's was to the effect that heavy support in the black communities that was identifiable, such as what we call ward ten, or the Davis Avenue area, which I would say is almost 99% black, if you've got that vote on the first ballot, then this would be used, and sometimes effectively, against a candidate on a run-off. So, to that extent, one had to be careful in soliciting the black vote, only to get a modest percentage on the first ballot.

Q Now, we have been talking generally about campaigns and elections county-wide. Would you make any distinction with respect to the principles that you have been discussings, depending on whether or not the campaign is for city or - - strike that - - for County Commissioner, or for School Board, or for, in the past, some county-wide legislative race?

A You mean of the methods of approaching the race, the difference in each of those three types of elections?

Q Yes, sir. That is what I was trying to ask.

A Well, in planning a campaign, one would have to use a different strategy in each race. To a large extent, a county commission race is a race for a full-time paid position. It is obvious that it is worth more in the way

of campaign contributions than a part-time job, such as a School Board race or a legislative race.

In fact, the School Board race is a race for a non-paying job, and is thus thought to cost less to run for that on a county-wide basis. Of course, legislative races are no longer county-wide. I am speaking of prior to 1972.

Q Can you give the court any idea of the round figures you are talking about that would be necessary to run a successful campaign for the County Commission and the School Board?

A The County Commission races, and I would have to base this on fairly current figures, would have to cost maybe thirty, forty or fifty thousand dollars at the present time. The School Board race would naturally cost a lot less, because it is for a non-paying job. It is considered more of a civic type job than a full-time job, like County Commissioner, and generally the candidates - it has been my observation - don't spend as much money for those races.

THE COURT: Let me ask you a question. You mentioned legislative races before 1972.

A Yes, sir. I meant before 1974.

THE COURT: Were all House races and Senate races county-wide?

A Yes, sir. All House members and Senators were

elected on county-wide ballots.

THE COURT: Had any black legislator been elected under that system?

A No black legislators elected.

MR. BLACKSHER: There were two who tried right in modern times.

A I can remember a man who now works for the tax assessors office, who runs a barber shop, named Clarence Montgomery. There have been.

Q Was there a Charles Bell that ran the same year that Clarence Montgomery did, right?

A I don't remember him.

Q Do you recall any others?

A There was a man that ran against Sage Lyons. I don't recall his name.

Q Well, now, I believe we can stipulate that Charles Bell, at one time, ran against Sage Lyons in the special election of 1969.

A I don't specifically recall. I do specifically recall Clarence Montgomery.

Q In any event, with respect to the figures that you have mentioned for financing a campaign for County Commissioner, is that the kind of money that any black candidate would be able to raise without some support of the white community -- without some white financial support?

A Let me say this. In the general experience of raising political money, and that is contributions I received in relation, one, to the importance of the office, and conjunctively with this to some extent was the general idea of what the chances are of the candidate to win. And a candidate who has, in essence, no chance and has a very difficult time raising much money than a few dollars from his friends and family.

Q Isn't it conventional wisdom in Mobile that a black candidate running county-wide does not have a good chance of winning?

MR. WOOD: Your Honor, I object to that. That calls for some sort of reputation in the community.

THE COURT: Yes, it does. I will let him answer that.

MR. PHILIPS: I didn't hear the question.

THE COURT: Read the question back to him, Mr. Reporter.

(Whereupon, the last question was read by the Court Reporter.)

MR. PHILIPS: Your Honor, I object to the question. I must confess to a political sophisticate like Mr. Edington, maybe - - conventional wisdom, I don't know what that term means.

A It is my personal opinion that a black candidate

in a county-wide race in Mobile County against a white candidate simply doesn't have any appreciable chance of winning. In fact, I would say no chance.

MR. BLACKSHER: Mr. Edington, you were a member of the Mobile County Legislative Delegation in 1963 and 1964, correct?

A That is correct.

Q As a member of the House of Representatives.

A Right.

Q And it was in 1964 that the Alabama Legislature enacted the pay or council bill that was eventually voted on by the voters of the city of Mobile in 1973; is that correct?

A That is correct.

Q In that bill, did it not provide that the council members, if the referendum had succeeded, would run for single member districts - -

MR. WOOD: Your Honor, I object. It is totally irrelevant to the county case.

MR. BLACKSHER: Your Honor, I think my next question will tie it up.

THE COURT: All right. Go ahead.

MR. BLACKSHER: Was there any discussion among the members of the Mobile County Legislative Delegation, at that time, about the possibility of having the county

members run from single member districts and, if so, what was the reaction of the Mobile County Delegation in respect to the effect it would have on the chances of blacks being elected?

MR. WOOD: Your Honor, I object. It is irrelevant.

THE COURT: I will let him answer.

A First, there was a discussion on the subject. Secondly, it was considered politically suicidal to vote for a bill that would assure to the election of black city officials.

Secondly and secondarily, as you know, this change of government bill had to be voted on about the public and it was generally considered that the public was highly unlikely to vote for a change of government bill that included single member districts, which would, in effect, assure substantial black representation on the city council.

Q The legislators, at that time, were very conscious of the effect of single member districts would have on the election of black candidates.

A Certainly.

Q Was there anything else that happened while you were a member of the Mobile County Legislative Delegation that would indicate the awareness of the legislation of

the effect that the at large - - that the three bodies have on the black vote and the ability of blacks to select their preferences?

A I am afraid I am going to have to ask you to restate your question. I am not quite sure what you mean by the question.

Q Was there anything else that happened while you were in the legislative delegation that indicated an awareness on the part of the legislators that the at large system prevented blacks from being elected?

A I would say any and all local bills to be general, any and all local bills that came up relating to elections, always brought up the subject of what effect is this going to have, in effect, you know, allowing blacks to be elected or keeping blacks from being elected, to be in a negative way. That is the concept of the single member district; always had as an over-riding issue, isn't this going to mean, in effect, guaranteeing black representation or whatever body might be involved. This is, you know, a general factor.

Q Can you give us any statement, Mr. Edington, based on your first-hand experience, about the relative percentage of blacks who were registered to vote during the first half of the '60's when you were engaged in those campaigns before the Voting Rights Act?

September 14, 1976 9:00 A. M.

THE COURT:

All right. Are the Plaintiffs ready?

MR. STILL:

Yes, sir, Your Honor.

THE COURT:

Defendants ready?

MR. KENNAMER:

Yes, Your Honor.

THE COURT:

You may proceed, gentlemen.

ROBERT EDINGTON

the witness, resumes the stand to testify as follows:

CROSS-EXAMINATION

BY MR. WOOD:

Q Senator, would you explain the local courtesy rule as it was used in the State Senate when you were up there?

A You said the State Senate?

Q Yes, sir.

A By special agreement among the three members of the agreement, and I am referring, of course, to the time I was there. I don't know what the rule is now, but, as far as I

know, it has not been changed; by agreement among the three members of the Senate elected from Mobile County. No local bill comes out of the local legislative committee in the Senate without the unanimous approval of all three, or the fact that none objects.

Q And if there is a Senator who objects, who opposes, the bill, he can still let it come out and vote against it.

A He can, and, as a matter of fact, that has been done

Q In fact, when you were in the Senate, bills came out of the local legislative committee and were passed by the Senate and enacted into law, bills that you opposed, but you let come out of the committee; is that correct?

A That is correct.

Q Do you know when that rule first came into effect- - when it was first used?

A Well, upon the reapportionment of the legislature, that was designed, of course, to give urban areas a more fair representation in the State Senate. Mobile County obtained three Senators instead of one and, when those three Senators were elected, it was my understanding that they then adopted that rule.

Q That was in 1966 when that was first adopted, wasn't it?

A Yes.

Q And now, in the House, the House doesn't or didn't

have that rule, did it?

A That is correct. As a matter of fact, quite often local bills would be debated on the floors of the House by members of the Mobile Delegation.

Q That would be a local floor fight right there in the House chambers, wasn't it?

A That is correct.

Q In fact, you and I have been on opposite sides of the microphone in that situation.

A On opposite sides and on the same side from time to time.

Q In the House?

A Correct.

Q Now, when you went to the Senate and you became familiar and started using the Senate local courtesy rule, there would be occasions when legislation that you favored would die because you decided to continue to adhere to that policy, isn't that right?

A I am not sure I really understand the question.

Q What I meant was that there were times - -

THE COURT:

Rather than break the courtesy rule, you would let your deal die.

A That is correct.

MR. WOOD:

of your campaigns, was it?

A In the sense that the candidate raised the issue, no.

Q Isn't it true that almost all candidates for county-wide office that you have known that wanted the vote of the black community?

A Well, basically, anyone running for office wants all the votes he can get.

Q Wouldn't you say the black community here in Mobile County is the most cohesive voting group that we have in this county?

A I would say up until the last probably two years. I don't know that that would be really true right now, but by and large I know of no other group that votes together nearly so much as the black community of this city or this county.

Q While it might not be true today, wouldn't you say the Non-Partisan Voters League was the single most effective endorsing organization in our county?

A In general, yes. Now, on an actual union management question, possibly the Southwest Alabama Labor Council could have similar effect, but, basically, for general issues, the Non Partisan Voters League was the most cohesive and most effective voter organization.

Q And there has never been in Mobile County, as far

as you know, a comparable white organization as effective and as long standing as the Non-Partisan Voters League; is that correct?

A That is correct.

Q By the way, blacks are members of the Mobile County Democratic Executive Committee, aren't they?

A Yes. They are elected from single member districts from various wards, precincts, or however it may be devised at the present time.

Q They have served on the Democratic Committee for many years.

A Since the committee was reorganized subsequent to the election of Bill Taylor to the Circuit Court many years ago.

Q That was done on a local level.

A To the best of my knowledge, it was changed by the rules of the County Executive Committee.

Q The State Legislature didn't dictate that change and the State Democratic Party didn't dictate that change, did they?

A I can say the legislature did not do it. The State Democratic Executive Committee, quite likely had a strong hand in it, but I don't recollect it.

Q Do you consider yourself an expert in Mobile politics and elections?

A I hardly think I am an expert in anything. I have had a lot of experience in it.

Q You have always tried to get the endorsement of the Non-Partisan Voters League.

A To the extent that I appeared before them and presented my position, but I was never endorsed by them.

Q As a matter of fact, you and I have been seen over there at their headquarters.

A I think everybody running for office in Mobile County at one time or another appeared before them and various other groups, yes.

Q And you didn't consider the endorsement of the League as the kiss of death, did you?

A No.

Q As a matter of fact, didn't you get the endorsement of the League the last time you were elected to county-wide office?

A I was co-endorsed along with Mr. Rasey Smith.

Q And that was - -

A Which is no endorsement. When they endorse two people in the same race, it amounts to no endorsement.

Q Didn't it also mean you and Mr. Smith were acceptable to the League and the black community?

A I would think possibly that would be correct.

Q All right, sir. That was in May, 1970.

A Yes.

Q And you got the black vote in that election, didn't you?

A Probably about even. I don't recall the precincts statistics, but it wasn't overwhelming.

Q Well, wouldn't you say that ward ten is a good example of a predominantly black ward in that election?

A It is the traditional baromether, you might say, of the effectiveness of the Non-Partisan Voters League endorsement.

Q And isn't that election in ward ten - - didn't you get 716 votes?

A Of course, I really don't recall what I got. If you have the figures, I am sure that is correct.

Q Yes, sir. I have the figures.

MR. BLACKSHER:

I object, Your Honor. If they are not in evidence, we would like to have them offered in evidence.

THE COURT:

I will let him ask him about them.

MR. WOOD:

Judge, I hate to give up my chat here. Let me let you look at this, Mr. Edington, and look at my totals.

A Right. It would appear from this that Edington received 716 and Rasey Smith, 293.

Q All right, sir.

MR. BLACKSHER:

If the court please, could this be identified for the record, please?

THE COURT:

Yes, mark it for identification.

(Defendant's Exhibit No. 2 was received and marked in evidence.)

MR. BLACKSHER:

Is that a copy of the official returns from the Probate Judge's election?

MR. WOOD:

Yes.

MR. STILL:

For which election?

MR. WOOD:

May Primary of 1970.

MR. BLACKSHER:

No objection.

MR. WOOD:

So, Mr. Edington, although there was a double endorsement in that election, in ward ten, you got 716 votes and Rasey Smith got 293.

A That is correct. It is also important to note that

there was no run-off. So, there was no opportunity to have used it against me in the Democratic Primary.

Q You were real glad to get that vote from that ward, weren't you?

A I certainly was.

Q Now, when you ran against Senator Sparkman, you tried very hard to get the endorsement of the black community here in Mobile County, didn't you?

A Essentially on a statewide basis. My meetings were almost entirely with the State Democratic Committee. The Alabama Democratic Conference is called in Montgomery.

Q In fact, you almost got the endorsement here in Mobile, didn't you?

A I don't see how I could have since Mr. John LeFlore was a candidate in the general election. Now, in the primary, he was not a candidate, to the best of my recollection. So, it might have been possible, but essentially my efforts were statewide, because in a statewide race, you really can't take too much time with one county.

Q Wouldn't you say that you can't fine tune an election so that you could get a good black vote, but not get the black vote?

A It would be extremely difficult.

Q Now, you gave an opinion that a black man -- or a

statement to the effect that a black man couldn't win, in your opinion, in a county wide race, did you not?

A Yes. I think that is absolutely a political fact.

Q One example of that was the Clarence Montgomery race that you were familiar with?

A That was an example, yes.

Q Yes, sir. Now, you knew Judge Grayson, didn't you?

A Very well.

Q He was one of our two Circuit Judges for many years?

A I knew him, you know, as long as I can remember.

Q Wasn't he one of the two Circuit Judges?

A Yes.

Q And the Grayson name and family were well known, weren't they?

A In fact, Billy Grayson's campaign slogan was, "Remember the name" quote, unquote.

Q And Mr. Montgomery and Mr. Grayson ran against each other?

A That is correct.

Q Mr. Grayson was a lawyer and Mr. Montgomery was a barber, and there was a runoff in that election?

A I really don't recall.

Q Mr. Montgomery wasn't nearly as well known as his opponent, wasn't he?

A I would say, in fact, the Grayson name was probably

A They have in the past. That influence is not effective now as it has been.

MR. PHILIPS:

I have no further questions.

REDIRECT EXAMINATION

BY MR. BLACKSHER:

Q Mr. Edington, concerning the endorsement of the Non-Partisan Voters League, which you said most politicians did, at one time or another, seek, isn't it true that merely seeking and obtaining the endorsement is not itself the kiss of death; for one reason, because the ballot only comes out like the night before the election and there is not enough time for your opponents, if you do get the endorsement, to capitalize on it unless there is a runoff?

A If there is no runoff, all the candidates want to get a copy of what is known as the pink sheet, which is the endorsement sheet of the Non-Partisan Voters Leage, as soon as possible. Those who get it, want to know they get it, and those who aren't getting it, want to get copies and spread them out to other areas in Mobile County to use against the candidate that got it.

Q That is why the Non-Partisan Voters League always tries to get it out as late as possible?

A In recent years, it was gotten out almost hours before

Supreme Court, U. S.
FILED
JAN 8 1979
MICHAEL RODAK, JR., CLER

APPENDIX

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-357

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN, et al.,

Appellees.

ON APPEAL FROM THE
UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

JURISDICTIONAL STATEMENT FILED AUGUST 30, 1978
PROBABLE JURISDICTION NOTED OCTOBER 30, 1978

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LONIA M. GILL

the witness, after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mrs. Lonia M. Gill. She is fifty-eight years old. She lives at 2854 Whistler Street, Whistler, Alabama.

She is married. She attended Mobile County Training School and Tuskegee Institute. She has lived in Mobile County all of her life. She has two children. She is executive secretary for the A.M.E. Zion Church; is that correct, Mrs. Gill?

A That is quite correct, sir.

Q Were you a candidate for the Mobile County School Board in 1974?

A Yes, place one.

Q Who were your opponents in that race?

A There were five.

Q Could you name them?

A Yes. Mr. Roland Sanders, Dan Alexander, Gearney Owens, Mr. Westbrook. I don't remember his first name.

Mr. Voyles, and myself. I think that is six in all. Five men and one woman.

Q In that election, first, were you the only black candidate in that race?

A The only black candidate and the only woman.

Q Did you gain -- was there a runoff in that election?

A Yes, there was a runoff between Mr. Alexander and myself.

Q All right. And Mr. Alexander won?

A Yes, he did.

Q Mrs. Gill, did you notice any overt racial campaigning in that election?

A Any what did you say? Racial campaigning?

Q Yes, ma'am?

A None that I noticed. I am sure there must have been some. A candidate can't see everything, but there had to be some, Mr. Menefee.

Q Do you think race was an issue or a major factor in the election?

A Yes, I will always believe that race was a major factor.

Q Mrs. Gill, from your experience in this race, do you think, or do you have an opinion on the chance of a black candidate running County wide in Mobile County against a credible white opposition?

MR. PHILIPS:

Your Honor, I object to that question. There is no proper predicate shown to qualify her to give an opinion. There are many,many other factors that might be involved in a political campaign and political races. All this lady testified to was she ran for office one time and lost.

THE COURT:

I will let her express an opinion. Of course, you can cross examine her. It doesn't mean the Court accepts or rejects.

A Are you saying, Judge, I am at liberty to answer the question?

THE COURT:

You may.

A Thank you, Judge.

In reference to your question, sir, my personal opinion to that would be that I would think that blacks would have -- not have a very good chance running in a county election.

Q Would you run again under similar circumstances in an at large election for the Mobile County School Board?

A Not under the present set-up. I really don't think I would, even as much as I enjoyed the campaign. I don't think I would.

Q Did you enjoy the campaign, Mrs. Gill?

A I did. I would be telling something that wasn't so if I said I didn't.

Even though I lost, I enjoyed the campaign, because it was very rewarding.

Q Mrs. Gill, about how much money did you spend on your campaign?

A It wasn't too much spent, because I didn't have too much; a couple of thousand dollars.

Q Did you appear on radio and T.V.?

A Yes. I guess I must have appeared on all of the radio stations and T.V.

Q What sort of paid advertising did you use, Mrs. Gill? Did you have printed material?

A I did. I had plackerts. I had cards. I had one of these street streamers. I am not so sure that is the correct title for it, but it was over here on Springhill Avenue. I had bumper stickers.

Q Did you campaign county wide in both the black and white communities?

A I did county wide, all over. It seems as if all th candidates -- I am not so sure that this is really correct -- I got the impression that all of the candidates were invited to most of the happenings, because, whenever I was there, everybody was there seemingly.

Q Mrs. Gill, are you able to tell us where most of

your campaign contributions came from as to whether or not they were from predominantly the black community or the white community?

A I don't know that I can, because really it came from both. I don't know if I -- I am almost sure I must have gotten most of it from the black community, but I got some white contributions, also.

Q Mrs. Gill, are you familiar with Dr. E. B. Goode?

A Quite familiar, sir.

Q He was a candidate for the school board in 1962. Is he well known and respected in the black community?

A I would think so.

Q What about Dr. W. L. Russell?

A I would think the same about Dr. Russell.

Q And Mrs. Jackie Jacobs?

A Yes, Mrs. Jackie Jacobs, also.

Q She is well known and respected?

A She was at the time. She doesn't live her any more; I don't think.

Q In your campaign, would you tell us about some of the endorsements you received from endorsing organizations?

A Yes. Number one, Mobile County Teachers Associatior endorsed me, because they were -- the real reason why I got in.

Q That is a bi-racial group?

A Oh, yes. The Non-Partisan Voters League, Associated Press, the -- I can't remember. I had several endorsements, but those were some of the major endorsements.

Q You received the "A" vote?

A Yes, I did. In the very beginning, they did not endorse me, but they did when I got in the runoff. In the beginning they endorsed someone else.

Q Am I correct in understanding that the endorsement of the "A.E.A., Alabama Education Association.....

A Yes, sir.

Q Did you receive the endorsement of the Press Register?

A Yes, I did, both times.

Q Would you tell us a little bit about your background and experience and education as it relates to the Mobile County Educational system, your work and participation as a parent in education?

A Okay. I would rather start from the beginning. I first started working with the Mobile County school system as a teacher. Then, I left the system and worked for the government. Then, I worked with the PTA as county wide president, and was elected statewide president. I was president of the Alabama Congress of Colored Parents and Teachers when the two state congresses merged in 1971. They merged into one state organization.

Then, I, after the phasing out of the -- or the

and you carried on a campaign with a determination to win, didn't you?

A Yes, sir.

Q That was the first time that you had ever run for political office, wasn't it, Mrs. Gill?

A That was my first bid for public office, sir.

Q Had any member of your family, by the name of Gill ever run for political office before?

A I don't think so.

Q In the runoff, you were running against a fellow that had run for political office before, hadn't he?

A I was aware of that.

Q He was running as a long time supporter of Governor Wallace, wasn't he?

A Yes.

Q And he was a fairly well known man around town?

A He was.

Q I believe you said that during the campaign you attended rallies all around the County with the other candidates. You made an appeal to the people there to vote for you, didn't you?

A I did.

Q And you were also endorsed by the Non-Partisan Voters League, which was the endorsing black organization, isn't it?

A Yes.

Q And you were also endorsed by the Alabama Educational Association?

A No, the Mobile County Teachers Association.

Q The Mobile County Teachers Association?

A Yes.

Q And the Associated Press?

A Yes.

Q And the Mobile Press Register?

A That is right.

Q Did you find any all white endorsing organizations in that campaign, Mrs. Gill?

A Any all white endorsing --

Q Comparable to the Non-Partisan Voters League?

MR. MENEFEE:

Objection, Your Honor. I don't believe it is in the record that the Non-Partisan Voters League is all black.

MR. KENNAMER:

Is the Non-Partisan Voters League all black, Mrs. Gill?

A No, it is --

THE COURT:

Is it predominantly black?

A I think it could be.

MR. KENNAMER:

Do you know of any whites that are in it?

A No, I don't know them personally.

THE COURT:

Do you know a comparable organization among the whites?

A No, Judge.

MR. KENNAMER:

That is a non-paying job, too, isn't it, Mrs. Gill; the school board?

A Yes, it is.

Q I believe you said that you received contributions from whites and blacks?

A Yes, I did.

Q And you spent about two thousand dollars?

A More or less.

MR. KENNAMER:

I believe that is all.

MR. PHILIPS:

I have a few questions.

CROSS EXAMINATION

BY MR. PHILIPS:

Q Now, Mrs. Gill, in your approach to your campaign, if I am not mistaken, one of the things that you campaigned heavily on was the fact that you should be elected to the position because you were a woman; is that correct?

A That is what I was telling you, sir. I did not stress that too much.

MR. PHILIPS:

I have no further questions.

MR. MENEFEE:

No questions.

THE COURT:

You may come down. Whom will you have next?

MR. MENEFEE:

Mrs. Gerre Koffler.

GERRE KOFFLER

the witness, after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mrs. Gerre Koffler. She lives at 4208 Rochester Road in Mobile. She is married and is the mother of three children. She has attended the University of Alabama, Springhill College and the University of South Alabama.

She has lived in Mobile County since 1954. She works for the Public Relations Council.

Is that a correct statement, Mrs. Koffler?

A That is right.

Q Mrs. Koffler, were you a candidate for the school board in 1972?

A Yes, I was.

Q Who were your opponents in that race, please, ma'am?

A Bill Westbrook and Homer Sessions.

THE COURT:

That was in 1972?

A Yes, sir.

THE COURT:

All right.

MR. MENEFEE:

Was there a runoff in that election?

A Yes, sir, there was.

Q And did you make the runoff?

A Yes, I did.

Q Against Mr. Sessions?

A That is right.

Q And Mr. Sessions won?

A That is right.

Q Do you remember approximately what the margin of victory or votes were?

A In the first election, I carried the ticket by a very small number of votes. In the runoff, Mr. Sessions beat me between twenty-five hundred and three thousand votes.

Q Mrs. Koffler, have you worked in other elections in Mobile County?

A Yes, I have.

Q Would you describe very briefly your participation in other elections?

A Well, in the past May primary our firm represented about six or seven different candidates, some in Baldwin Count and some in Mobile County, for the County Commission, District Court Judge, State Board of Education, and so forth. I think we did some work for one of the school board candidates.

Q And prior to this May, what other campaigns have you been involved with?

A A Judge's race in Baldwin County, and I was involved in the Sheriff's race.

Q Sheriff's race in Mobile County?

A Yes.

Q Mrs. Koffler, you are white, but was race an issue in your campaign in 1972?

A I believe it was.

Q What leads you to that opinion?

A Well, I believe we had got documents to show that race was. There was a smear sheet during the runoff, two smear sheets that were passed out in both the City and the County. There were several, what I guess you would call, racist ads run during the runoff. I had several threatening phone calls.

My daughter was harassed at Murphy High School. So, I believe you could easily say that race was involved.

Q Mrs. Koffler, I would like to show you a page from Exhibit number 63. Is that the type of advertisement?

A That was one of the two smear sheets that were put out. There was another one. I don't see it here.

Q This page says, "Who will run your schools?" And it has a picture of John LeFlore.

MR. PHILIPS:

Your Honor, I object. I think the Exhibit speaks for itself. I don't think it is necessary for Mr. Menefee to read it into the record.

MR. MENEFEE:

Mrs. Koffler, was this and other advertisements similar to it part of the tenor of the campaign?

A I think it was in the runoff, yes.

Q Your Honor, this is Exhibit number 63. It is a collection of newspaper advertisements of various campaigns. Several of them refer to Mrs. Koffler's campaign and we would like to offer these into evidence.

THE COURT:

Mark them.

(Plaintiffs' Exhibit 63 was received and marked, in evidence.)

MR. PHILIPS:

numerous other newspaper articles that this woman -- that this lady is not involved with.

MR. PHILIPS:

I don't think that she can authenticate these.

THE COURT:

Those are newspaper articles. They are self-authenticating; Rule 602(6).

MR. PHILIPS:

Your Honor, some of them appear to be something other than newspaper articles.

MR. BLACKSHER:

If it please the Court, there are one or two handbills that are not newspaper articles that will be authenticated by Mr. Langan.

THE COURT:

As to those, I will hold up on that. Go ahead.

MR. KENNAMER:

Mrs. Koffler, would you tell us about the runoff election with Mr. Sessions, as to -- were there allegations of block voting?

A Yes, there was a block ad put in during the runoff.

Q How does this operate, in your race in particular? What was the tenor of this argument that is made about the block vote?

A Well, the ad said something about don't let the

block vote tell you how to vote or something to that effect.

Q What was --

A It said the black block vote and it had figures from various wards.

Q Were these wards in the predominantly black section of town?

A Yes, they were.

Q Mrs. Koffler, from your experience in your race in 1972 -- have you run for any other office?

A Yes, I ran for delegate to the Democratic National Convention as an uncommitted delegate.

Q In 1976?

A Yes.

Q From your experience in these two races that you were a candidate and on the other races that you have worked in, do you have an opinion as to whether or not race is a major factor in campaigns in Mobile County?

MR. PHILIPS:

Your Honor, I object on the time frame. It is not indicated that she has worked in any political campaigns or at least no time has been given as to when she worked in these political campaigns. There is no proper predicate.

THE COURT:

She can testify from 1972 on.

A Would you rephrase that question or give me the

question again?

MR. MENEFEE:

From your experience in your own two campaigns and the others you have worked in, do you have an opinion as to whether or not race is a major factor in campaigns, in Mobile County?

A I think in my race it was raised as a major factor. In some of the others I worked on, there was no race at all. It was strictly on other issues. In one or two, yes, race did come up. Every time race came up, to my knowledge and to the best of my memory, the candidate was defeated.

Q I would like to ask the Clerk to show the witness Exhibit number 65, please.

Mrs. Koffler, would you identify Exhibit number 65, please?

A It is an ad placed by Nicholas Kearney in the May election for District Court Judge and it says --

MR. WOOD:

Your Honor, I object to reading what it says into the record until we have determined whether it is admissible or get a little further identification of it?

MR. MENEFEE:

That is right. Do you know where that ad was published?

A Yes, I do.

Q Where?

A Chickasaw News Herald and the Mobile County News.

Q That was in the election this past May?

A Yes, it was.

Q Your Honor, we move the admission of this advertisement.

THE COURT:

All right.

MR. PHILIPS:

Your Honor, I would object to it. I don't think it has any relevance as far as the school board is concerned.

I realize your Honor is overruling this objection every time I make it. I still don't think it has any relevancy at all to the issues having to do with the school board.

THE COURT:

Yes, I will overrule it. Let it in.

(Plaintiffs' Exhibit 65 was received and marked, in evidence,)

MR. MENEFEE:

Mrs. Koffler, is this one of the examples of an election you worked in and saw race raised as an issue?

A Yes, it is.

Q Mrs. Koffler, is there any other issue in Mobile County since 1972, in your experience that compares to race as

about it.

I have not come across Mr. Westbrook in the past year. Every time I am openly involved, not on a professional basis, Mr. Westbrook comes from out of the bushes and takes a crack at me.

Q On that page twenty, who paid for that advertisement, please, ma'am?

A Lloyd C. -- looks like Durrell.

Q Thank you, ma'am.

Mrs. Koffler, from your experience in politics in Mobile County, how would you describe the chances that a black candidate would have against a white candidate with approximately similar qualifications and experience?

A I would think that he would have a rough go, or she.

Q Would you make any distinction as to county and school board races?

A I think that as far as a county wide race goes, such as the county commission, it would be very, very difficult for a number of reasons. I think that a qualified black candidate would have a chance at a school board election if they were running against someone who was beatable. If they were running against someone who was an incumbent and has done a very good job, I don't believe they would have a chance.

I think a good possibility that the right black could have won a seat in this last school board election if he had

no other white opposition, but the incumbent. If he had equal white opposition, I don't think he would have a chance.

Q You are posing the situation of a particular white candidate with --

A I imagine that is what I am doing.

THE COURT:

I thought you were talking about a black candidate. Are you talking about a white candidate?

A No, I am talking about a black candidate running against a white candidate, a particular white candidate.

MR. MENEFEE:

Would you care to -- do you have anyone in mind?

A Yes. I believe that Mr. Williams was beatable in the last school board election and I think that was born out by the vote.

Q I see. But, as a general proposition, equally qualified black and white candidates?

A I don't think the black would have been able to beat the white candidate in that same election.

Q Mrs. Koffler, are you familiar with the Non-Partisan Voters League?

A Yes, I am.

Q Did you receive their endorsement when you ran?

A Yes, I did.

Q Mrs. Koffler, do you have an opinion whether or not

Did I understand you to say, Mrs. Koffler, that there is a good possibility that a black could win in a school board race, now?

A Against a particular candidate. I didn't say that I felt that a black could win any school board position. I said that I felt that a qualified black, without white opposition, could have defeated Bob Williams and that was all I said.

MR. KENNAMER:

Judge, that is all.

THE COURT:

Mr. Philips, for my information, I had to set other things during lunch time. How long is your cross going to take?

MR. PHILIPS:

Your Honor, perhaps five minutes.

THE COURT:

I have some things. I am sorry to have to make you come back. You will have to come back at one-thirty.

MR. STILL:

Your Honor, could we move the admission of a couple of Exhibits at this point?

THE COURT:

What about letting me take it up after lunch. I set something at eleven-forty-five and I am running behind now.

you?

A No, they didn't.

Q How about the Mobile Press Register?

A No.

Q How about the Mobile Chamber of Commerce?

A I don't believe they endorse candidates.

Q Okay. They didn't endorse you in any event?

A No.

Q What was the cost of your campaign, Mrs. Koffler?

A Five thousand dollars for both the first primary and the runoff.

Q I am sorry. You said that included the primary and the runoff?

A Both elections, twenty-five hundred dollars a piece.

Q Did you pay for that out of your pocket or did you have campaign contributions?

A I had contributions.

Q Did those come from the white community and the black community?

A Yes, mostly from the white community. In fact, ninety-nine percent.

THE COURT:

I thought y'all got mixed up.

A I said ninety-nine percent came from the white community.

The second reason, there was a little money transaction going on with the school board that I knew a little something about, and I wanted to be there to protect our tax money, I guess, and I just felt it was important that the parents were representative on the school board.

Q Had you received some publicity prior to your campaign in the National media for your work with the school system?

A Yes. ABC television televised the opening of schools in September, and they -- I had headed a campaign to try to have peaceful integration of the schools. The court order -- I didn't want my children beat up and I didn't want any trouble. I mounted a summer campaign called "Make It Work". And we were on television. The ABC cameras came down to see how it worked and they focused in on the work we had done and a button I had designed that said "Make It Work", and they ended their T.V. thing with that and mentioned my name. Time Magazine also mentioned it with the good work that Mobile did so they would have peaceful integration in the schools, or busing, or whatever it was.

Q Well, as to your position in particular on that matter of busing, in this organization called the theme of "Make It Work", was it in favor of busing?

A I had no position on busing. I was tagged the busing lady and so forth. I don't know how I got that. My position was there wasn't one thing we could do about it. This

was something the Court had handed down and it was the law of the land and I was very, very concerned about our children, especially my children, and I said, when I went out and campaigned, I had addressed interests that I was a parent of public school children and I was very concerned, and I had no stand on the morality or the rightness or wrongness of busing, and it was the law, and I think that is one time I did support Wallace. I was for law and order.

Q And then you entered -- then you became a candidate?

A It grew from that. I got a lot of support from teachers and PTA's for that work in a lot of communities.

Q Now, Mr. Kennamer, in his cross examination, mentioned several newspaper ads?

A Yes.

Q Would you take a look at the selection, Exhibit number 63, the collection of newspaper ads, particularly pages fourteen through twenty. Do you recognize those?

A Yes.

Q As being from your campaign?

A Yes.

Q Would you describe how the issue of -- how race was injected into the campaign?

A I think it was injected by my opponent. They accused me of being for busing and they were against busing. I believe the race issue, as I said before, it was not as

prominent. It was sort of fault in the rallies between Mr. Westbrook and I and Mr. Sessions did not get involved very much. Mr. Westbrook took shots all over and tried to get me to say that I was for busing, which I say I was not for or against. After the initial race, and I led the ticket Mr. Westbrook gave his endorsement to Mr. Sessions, and that is when all the racism, in my opinion, came out.

Q What sort of things were you accused of in these ads?

A Well, I was accused of dating black men. I was accused of entertaining black men in my home. I was -- a set of boys made to try to get me to meet a black at a motel and have someone there to take pictures and use that in a smear campaign, but my husband went instead of me, and I got threatening phone calls in the middle of the night all during the runoff.

Q Were you associated with father Foley at Springhill College?

A I attended Father Foley's human relations workshops.

Q Mrs. Koffler, you have talked about how the black vote is apparently more fragmented now than it was in the sixties and mentioned, however, there was still some similar interests. Do you think today there are still some similar interests in the black community that a candidate could address and receive a substantial or overwhelming vote in the black

A Fifteen thousand, I am sorry. Mr. Westbrook had eleven thousand.

Q In the runoff, how many votes did you get?

A Fifteen thousand nine hundred and something.

Q How many votes did Mr. Sessions get?

A Eighteen something. I am not sure, of the exact figures. There was anywhere from two thousand five hundred to three thousand differential.

MR. KENNAMER:

Thank you, ma'am. I have no further questions.

THE COURT:

May we excuse this witness?

MR. MENEFEE:

Yes, sir.

THE COURT:

You may be excused. Whom will you have next?

JAMES E. BUSKEY

the witness, after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

Q This is Mr. James E. Buskey., He is thirty-nine years old. He lives at 2207 Barretts Lane. He is married and

has a B.S., M.A.T., and E.B.S.

He has lived all of his life in Mobile County and was born in Greenville, Alabama; is that correct, Mr. Buskey?

A Yes, sir.

Q Mr. Buskey, are you currently a member of the Alabama Legislature?

A Yes, sir, I am.

Q Through what process were you elected to the Alabama Legislature?

A We went to the Democratic Primary race in May and faced Republican opposition this past August 31st and we were successful for our bid to the Alabama Legislature.

Q Is this for House District 99?

A Yes, sir.

Q The unexpired term of the late John LeFlore?

A Yes, sir.

Q Have you ever run for any other political office in Mobile County?

A Yes, sir. I have won others.

Q What is that, please, sir?

A Two years ago in 1974 I ran for the State Senate, District 33, to the Alabama Legislature.

Q Real briefly, how would you describe who you ran against and was there a runoff?

A There were four people in the race in 1974, Mr.

Henry Rembert, Mr. Black, Mr. Perloff and myself.

During the first primary, we received the second highest number, and Mr. Perloff received the highest number, and there was a runoff in which Mr. Perloff obtained approximately three hundred votes more than we did.

Q All right. Let's focus on that race. Have you been active in any other political campaigns in Mobile County?

A Yes, sir.

Q Which ones?

A Four years ago in the City Council race in which Langan was a candidate for the City Council. We were active in that campaign, working on his staff and we worked the four years ago in this election.

Q That is in Prichard?

A Yes, sir.

Q Mr. Buskey, give me your attention to the 1974 race against Mr. Perloff? Mr. Perloff is white; is that correct?

A Yes, sir.

Q What can you tell us about the racial composition of the Senate, District 33, please?

A I believe the composition is fifty-five percent black and forty-five percent white.

Q What is the population of the registered voters; would you have any idea?

A That should be registered voters, about fifty-three

percent registered voters, who are black. Almost fifty-fifty, but I think it is tilted slightly in favor of black registered voters.

Q Okay. To what extent do you think your race is an issue in that or was that a factor in that campaign?

A I believe very strongly that race was a dominant factor and the outcome of the election was determined on race. During the first primary, when there was four of us, two blacks and two whites, there were not to my knowledge any racial campaigning.

When the runoff occurred, when I faced Mr. Perloff, who is white, I believe very strongly that the race was decided primarily on race. I say that based on information that I saw and heard and received; primarily the distribution of race oriented literature by the campaign workers or the staff of Mr. Perloff in the second runoff.

This campaign literature exhibited me on the front page as the person who will represent the district if he was not elected and this campaign literature was passed out wholly in the white section of District 33, primarily Chickasaw and Whistler.

Q That literature wasn't distributed in the black areas?

A No, sir, it was not.

Q Are the black and white areas fairly well dependent

in Senate District 33?

A Yes, sir, they are.

Q How did you conduct your campaign in Senate District 33? Did you campaign only in the black community? Did you try to solicit votes in the white community?

A We canvassed approximately eighty percent of the district. We went door to door talking about our candidacy and talking to the people. The areas that are heavily populated, we canvassed all of that and that included both black and white communities.

Q In terms of your campaign in the black community, were you able to address any particular issues that were of concern to the black citizens and, if so, what were they? How would you identify those issues?

A One of the overriding issues that we found was a lack of jobs that the citizens of the black community expressed. Another one was an occasion they did not feel that they were getting fair police protection.

As a matter of fact, allegations of police brutality were even made and, in certain areas, particularly in the Trinity Gardens area, two years ago they had no adequate sewage and drainage system. A number of common problems like this was expressed to us and we, of course, tried to address to that.

Q Approximately how much did you spend on the campaign

in Senate District 33, Mr. Buskey?

A We spent approximately thirty-five hundred dollars.

Q Did you use any television coverage?

A No, sir.

Q Did your campaign include voter registration drives, as such?

A Not the voter registration drives in terms of our concentrating on registering voters. We encouraged people that were not registered to register and vote hopefully for us.

Q Very briefly, let's look at your House District 99 race. Would you describe your opposition and how that election proceeded?

A In the House District 99 race, there were seven in the race. Two withdrew, white persons. All of the contestants were black. We received the highest number of votes. It was not a majority in the first primary, and our runoff was with Mr. Abe Flannigan, and we were successful in receiving the highest number of votes in the second runoff.

Q And then you had a general election?

A Yes, sir.

Q Against Republican opposition this August 31?

A That is correct.

Q How many votes did the Republican candidate get August 31st, Mr. Buskey?

A Approximately a hundred or maybe a hundred and five, ten, or fifteen. A little more than -- between a hundred and ten and a hundred and fifteen.

Q Okay. Mr. Buskey, was the House District 99 a hotly contested race, or was there a lot of campaigning in the district?

A Yes, sir. Let me describe it not a hotly contested race, but a very interesting contest between the participants.

We had five people that were actively campaigning hoping to get elected, and those five persons, in my judgement, created more interest in an election than anything I have seen in a long time, particularly in the black neighborhood. There was five well known people in that election and the reception and the turn-out of the voters was somewhat surprising, and it was a very nice one.

Q Did you receive the endorsement of the Non-Partisan Voters League in your race against Mr. Perloff?

A Yes, sir.

Q Did you receive the endorsement of the Non-Partisan Voters League in your race for House District 99?

A No, sir.

Q Do you know who received it in that election?

A Yes, sir, Mr. Flannigan did.

Q Does House District 99 include the Davis Avenue area?

A A very small portion of Davis Avenue, from Live Oak Street back to Three Mile Creek. The majority of Davis Avenue is not in 99.

Q House District 99 is in the City of Mobile, isn't it?

A Yes, sir.

Q In your experience in those two races, do you think the Non-Partisan Voters League endorsement is able to deliver or to assure a substantial or overwhelming vote for its selection in the black community?

A It is my belief that no endorsing group can assure or deliver votes. They can help substantially in swaying people to that particular endorsement, but, in terms of assurance, I don't believe that any endorsing group can do that.

Q Are you a member of the Non-Partisan Voters League?

A Yes, sir, I am.

Q Mr. Flannigan is also; is that correct?

A Yes, sir. I might indicate that I have been a member since the second primary.

Q Was your race against Mr. Perloff in 1974 the first time you ran for political office?

A Yes, sir.

Q Have you ever considered running for either the Mobile County Commission or the Mobile School Board?

A No, sir.

Q Do you think a black person running at large for either of those bodies would stand a good -- what kind of chance do you think a black person running at large would stand running against credible white opposition?

A A black person running at large in a race in the city and county of Mobile would not stand as good a chance in my judgement of winning an election.

Q Would you run?

A No, sir.

MR. MENEFEE:

No further questions, Your Honor.

CROSS EXAMINATION

BY MR. WOOD:

Q Representative Buskey, in your race with Mr. Perloff, he had been in the legislature for eight years, hadn't he?

A Yes, sir. He had served in the legislature prior.

Q And he had run several county wide campaigns, hadn't he, prior to that race?

A That is correct.

Q Now, I believe you testified that racial campaigning was conducted in the primary runoff; didn't you say that?

A Yes, sir.

Q Now, you are not saying that Mr. Perloff did it, are you?

Q And Mr. Perloff campaigned mostly in the white area and you campaigned in the black area?

A No, sir. We canvassed approximately eighty percent of the district and that included both black and white areas.

Q Didn't that vote in that particular race break down generally along racial lines?

A Yes, sir.

Q You got a majority of the black vote, a vast majority, and Mr. Perloff got a majority of the white votes?

A Yes, sir.

Q And the whites out voted the blacks in that particular senatorial district, isn't that what happened?

A Yes, those are the facts, in terms of the voting that occurred two years ago.

Q And it was a close race and Mr. Perloff just nosed you out, isn't that correct?

A Yes, sir.

Q And you contested that election before the Democratic Executive Committee?

A Yes, sir.

Q And then in court, isn't that correct?

A We filed a challenge contesting the election before the Democratic Executive Committee. We never received a hearing in court. So, we did have a -- secretary to go into court to have a ruling, but we did not have a hearing.

Q All right. By the way, in your discussions about your race for the House District 99, Abe Flannigan is a member -- a longstanding member of the Non-Partisan Voters League, wasn't he?

A He said he was.

Q And you just got in, didn't you?

A Yes, sir.

Q Wouldn't you say that the election endorsement was followed by the black community pretty much up until the death of John LeFlore?

A Yes, sir. I would say that is correct.

Q And he died in December of '75, didn't he?

A Yes, sir. I had it January.

Q Well, maybe you are right, January of this year or December of '75?

A Yes, sir.

Q And up until that point of time, the election endorsement has been extremely effective, hasn't it?

A Up until that time. Well, really, if you will go back two years, when John officially entered politics, the election endorsement had been effective. I think that two years ago when Mr. LeFlore sought the House District 99 seat, I am sure his concentration was on getting elected more so than trying to get the voters out or seeing that the endorsement of the league was adhered to. So, prior to two years

ago, I would say that the Non-Partisan Voters League was very effective in getting out the votes and swaying the voters.

Q Wouldn't you say that ward ten, and whatever it is called now, that area has generally followed the election endorsement for many, many years?

A Yes, sir.

Q Isn't that correct?

A Yes, sir.

Q By the way, I believe in the City trial you testified that Mr. Langan and one of the county commissioners had been extremely fair to blacks, you thought?

A Yes, sir, in my judgement.

Q And that other County Commissioner was who?

A Commissioner Coy Smith.

Q Yes, sir. Now, did you testify that there was a lot of interest in the race out there in House District 99?

A Yes, sir.

Q Approximately how many people lived in a House District?

A Approximately thirty thousand, roughly thirty thousand, maybe thirty-one or thirty-two thousand.

Q Thirty-one or thirty-two thousand? So, approximately, how many people live in House District 99 and how many people turned out to vote in the Democratic Primary in House District 99? An all black race?

A I recall about forty-three or forty-four hundred.

A Yes, sir.

Q I want to ask you this. You made the statement that a negro or black would not stand as good a chance against a white in a school board County Commission race. Do you remember saying that?

A Yes, sir.

Q Are you familiar with Mrs. Gill's race against Dan Alexander?

A Yes, sir, I am.

Q She lead the ticket in the primary, didn't she?

A No, sir, not to my recollection.

Q Didn't she get in the runoff?

A She was in the runoff.

Q She ran a credible race?

A Yes,sir.

Q And got many many votes in the white community?

A I am not sure of that.

Q She eliminated five whites in the first primary, didn't she?

A You see, in an at large election with one black running and that black is a credible black person with a good reputation and you have a number of whites, a black can always, if he is a credible black, can get into the runoff. But, now, a person does not get elected by getting into the runoff.

Q No, but they have more than a goose of a chance,

don't they?

A Of being elected? They don't have a goose of a chance of getting elected. They can get into the runoff.

MR. WOOD:

That is all.

MR. PHILIPS:

I have no questions, Your Honor.

MR. BLACKSHER:

No further questions.

THE COURT:

All right. Whom will you have next?

MR. MENEFEE:

David Lee.

DAVID A. LEE

the witness, after having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. MENEFEE:

This is Mr. David A. Lee. He is age thirty-eight. He lives at Route 2, Box 994 in Daphne. He is married and has five children and he finished high school in Mobile and at the Allen Institution, and received a Bachelor's Degree from the University of South Alabama.

I think it is relevant and also we don't have a chance -- I don't know about its accuracy or authenticity.

MR. PHILIPS:

We object, also, on the same ground, Your Honor.

THE COURT:

I will let it in.

(Plaintiff's Exhibits 1, 95, and 93 were received and marked, in evidence.)

MR. STILL:

Your Honor, I don't believe they objected to the authenticity of that in the document exchange, but, as I say, it was prepared by the Mobile Regional Planning Commission.

THE COURT:

It is in. All right. Whom will you have next?

JOSEPH N. LANGAN

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

May it please the Court, this is Mr. Joseph N. Langan He is sixty-four years old. At least He was right before the City trial. 267 Houston Street is his address. He has been

a resident of Mobile for his entire life. He is presently a practicing attorney here in Mobile.

Is that correct, Mr. Langan?

A Yes.

Q Mr. Langan, you were also -- you had been elected to the Alabama House of Representatives from 1939 to 1943. You were State Senator from 1947 to 1951. You were City Commissioner from 1953 through 1969. Is that correct, sir?

A Yes, sir.

Q At one point in the years 1950 and 1951, you were appointed to the City Commission?

A Yes, sir.

Q Would you, just briefly, tell us what those circumstances were of appointment?

A A County Commissioner was elected City Commissioner and I was appointed to fill out the rest of his term.

THE COURT:

What year was that?

A 1949 and 1950.

MR. BLACKSHER:

Q In total, you have once won an election to the House of Representatives, once to the Senate of Alabama, and four times to the City Commission; is that correct, sir?

A Yes, sir.

Q You were defeated in 1951 by Mr. Johnston, Mr. Tom

Johnston, in an election for the Alabama Senate; is that correct?

A Yes, sir.

THE COURT:

What happened to you in 1943?

A I was in the war.

THE COURT:

A politician with a gap in his years, that is unusual, unless he gets beat.

Go ahead.

MR. BLACKSHER:

I think you have the rank of general in the Army Reserves?

A Yes, sir.

Q In 1969, you were defeated a second time. This was by Mr. Bailey in a runoff for the City Commission -- not the City election?

A Yes, sir.

Q And in 1972, you were defeated in a runoff for County Commissioner by -- or in the Democratic Primary runoff, by Mr. McConnell?

A That is correct.

Q Going back to the first defeat that you suffered in 1951 to Mr. Johnston, do you attribute your loss to that election in any way to the factor of race?

A Well, I think that was one of the elements involved in that election, very definitely.

Q Would you explain why you have reached that conclusion?

A Well, there has been legislation before the Alabama Legislature, just prior to that election, in which I took some stands, regarding the Boswell Amendment and several other matters, which did not inure to my benefit from a racial standpoint in the next election.

Q Was there active discussion of your stand against the Boswell Amendment in that campaign?

A Yes, sir, by some of the campaigners and advertising.

Q Did you learn any lessons from that campaign concerning how to handle the race issue in the Mobile County election or City election?

A Well, not particularly, other than, as I say, I learned it was pretty difficult to take a stand in favor of black people in the community and get elected to office, because there had been several other things, including my criticism of the bus company for their treatment of the black people, and several other things that had come up, at that time.

Q In your campaign for the County Commission in 1972 in which you were defeated in the runoff by Mr. McConnell, was race a factor in that campaign?

A In the runoff it was used considerably due to the fact that I had gained a large plurality of the votes in the

black wards in the community and this was made a part of the advertising campaign in the runoff.

Q Well, you were endorsed by the Non-Partisan Voters League in the primary election; is that correct?

A Yes, sir.

Q And you received a substantial share of the black votes in the primary?

A That is right.

Q And your opponent, Mr. McConnell, used that against you in the runoff?

A Yes, sir.

Q Will the Clerk show the witness Exhibit 63, please -- Plaintiff's Exhibit 63.

This Exhibit is a group of newspaper advertisements and flyers from campaigns in the past. Mr. Langan, would you look at page four?

A Yes, sir.

Q Could you tell us if that advertisement concerns one of your campaigns and which one?

A Well, this is page four. This is not -- I don't believe this is an advertisement. This looks like a news article.

Q I don't have a copy in front of me, but I know it concerns your campaigns in some way.

A Well, yes. In other words, it was an ad run on Sunday,

line is missing. In other words, it doesn't have the statement as to who published it, but it does have Mr. McConnell's picture there and it states that he is speaking on issues. So evidently it was his ad.

Q In your opinion, Mr. Langan,was the block vote issue a substantial reason for your defeat in that 1972 primary runoff?

A Yes, sir. I think so. As I say, these number of advertisements, plus a number of other tear sheets that were distributed were all used in the basis of the campaign as a racial issue.

Q In the 1969 campaign against Joe Bailey for the City Commission, was race a factor in that campaign?

A Yes, sir.

Q Would you say that race and the race issue was a substantial reason for your defeat in that election?

A Yes. I would say it played a very important role both actively and inactively due to the fact of the lack of the turnout of the black voters for the election and, of course, the use by my opponent and his supporters of the racial support that I had received in the past in wards which have a large majority of white voters in them.

Q That was the election where black and white voter turnouts were held down by Hurricane Camille coming through the day before?

A Yes. There was about twenty-five percent less votes cast then than what had been cast in the City election the four years previous to that.

Q And the black turn out was also held down by a boycott caused by competing groups within the black political groups within the black community?

A Yes.

Q Mr. Langan, you have always been identified in your political career here in Mobile County as being a person who tried to be fair with the black community; isn't that correct?

A Well, since I have been in public office, yes. In my first campaign, it wasn't an issue due to the fact that there hadn't been any particular stand on the question back that far before World War II. In 1939, I don't think race entered into the campaign at that time.

Q There wasn't that many black voters, at that time?

A No, sir.

Q Do you have any idea how many registered black voters there were in Mobile in the first half of the sixties before the voting rights act was enacted?

A Well, there were very few. I wouldn't know exactly how many, but there were just a very small handful of voters in Mobile back before 1940.

Q But, to the extent that blacks were able to mount any kind of cohesive voting strength in any of these campaigns,

it was generally understood that they favored your election in most of these campaigns; isn't that correct?

A Yes, sir.

Q Could you tell us how, in spite of the open knowledge of the black communities support for you, you were able to be elected to the City Commission for at least four terms?

A Well, of course, because of varying factors. It was a natural turnover situation when I first ran. I mean, there was, over a period of years, my opponent had built up opposition to him and I received a pretty good against vote, and also there was -- my activity in Veteran's affairs and National Guard and other things, I think, attributed toward my campaign. So, there was just various factors involved in it.

Q To what extent was race an issue in your campaign for the City Commission during the period 1952 through 1965?

A Well, it was made an issue practically each time. Sometimes, in fact, the head of the Klu Klux Klan ran against me at one time and several other racial groups brought the question up in the campaign.

Q But, during that period of time, the size of the black electorate was not substantial enough to be the threat that it was in the latter half of the 1960's, was it?

A No, they had continually mounted campaigns to register voters and, as a matter of fact, the City of Mobile had attributed to it because the City Commissioners had required that

all City employees, in order to work for the City, had to be qualified voters. So, there were a number -- a large number of blacks that work for the City and they all had to become qualified voters. As I say, the continuing programs that were put on by the N.A.A.C.P. -- well, actually, the Non-Partisan Voters League and various other church groups and others that put on voting registration campaigns, they had built up a continual increase in the number of voters that qualified.

Q Were you opposed for re-election in 1965?

A Yes. I never ran. I didn't have opposition.

Q By whom, sir?

A Sixty-five -- let's see. There was Joe Bailey and there was a lady candidate and Mr. Hamrick. I think there was about five in that race against me.

Q What percentage of the vote did you get in that election?

A Almost half on the first race. In other words, I almost defeated all five of them in the first race. I was a few hundred votes short of a majority on the first race.

Q There was a runoff?

A There was a runoff between Joe Bailey and myself.

Q What was your margin of victory in the runoff?

A A little over three. Around three thousand votes.

Q Mr. Langan, in your opinion, could a black candidate running at large in Mobile County win an election either to the County Commission or to the Mobile School Board?

A I do not believe so.

Q Let me ask you a question about the inner relationship between the County government and the City government in Mobile since you are a bona fide expert on that subject.

A The relationship?

Q Specifically, what responsibility does the Mobile County Commission have for municipal services in the City of Mobile, such as street paving and drainage and so forth?

A Well, the County Commissioners practically always disavow any responsibility for any work in the City of Mobile. It was only through threatening to go out and fight against their bond issue I was able to finally get them in 1960 to include forty percent of the money for paving and other works to be done in the City of Mobile.

Q My point is, it is true, isn't it, that the City of Mobile is part of Mobile County?

A Yes, basically, under the law, and morally, and every other way. That is, the County Commissioners are or have a responsibility for the entire County including the City. As a matter of fact, at one of the public meetings, when I first started arguing with the County on that question, I had them get up and state they were just County Commissioners and inferred they had no responsibility. But, during the sixties, this did change, and we did get them to co-operate with the City on Airport Boulevard and several other major traffic

MR. BLACKSHER:

If you will, flip through there and look at Mr. Bailey's ad he ran on school issues saying that he would be opposed to busing, that he would support neighborhood schools, and he was running for the City Commission. I notice the same thing in some of the ads for candidates for the County Commission.

If they have no responsibility for the schools, why are they campaign issues?

A Well, because they thought it was a good issue.

MR. BLACKSHER:

That is all.

THE COURT:

Anything from anybody else?

MR. WOOD:

No, sir.

THE COURT:

I don't want to see y'all again.

(RECESS)

It is nine-thirty now.

MR. BLACKSHER:

Mr. Alexander was suppose to be here at nine.

THE COURT:

Those are your only two witnesses?

MR. BLACKSHER:

Yes, sir.

THE COURT:

Well, I will tell you what we can do, at this time. The Court takes judicial notice of its own record, but I would like for -- I don't want to encumber the record with all of it, but I would certainly like for the docket sheet, and the appeals, and the decrees and orders of the Court in the Birdie Mae Davis case to be part of this.

MR. BLACKSHER:

Just the docket sheet?

THE COURT:

Well, to keep them from being an encumbrancy.

MR. BLACKSHER:

That is about a ten filing cabinet case.

THE COURT:

All I want is the docket sheet to indicate to any reviewing Court those things that they might want to look at, and to indicate that I have availed myself of that, of any of the orders and decrees and appeals and so forth of that.

No, not the whole files, but the docket sheet shouldn't be nearly that much. I will just put it this way in the record. The docket sheet and any findings of fact; I will indicate specifically those things that were particularly taken notice of.

MR. BLACKSHER:

I think the docket sheet is probably thirty pages long.

THE COURT:

Well, you introduced books and thirty pages is nothing.

MR. BLACKSHER:

Well, I was thinking Your Honor would have a chore on your hands, and I think the lawyers will testify that it is difficult to deal with. There have been fourteen or fifteen appeals to the Fifth Circuit and two appeals to the Supreme Court.

THE COURT:

I think the history of that case has a bearing on this case.

MR. BLACKSHER:

Well, we do too, yes, sir.

Your Honor, with respect to Mr. Alexander, we are not going to ask the Court to wait. If necessary, we would waive our right to call Mr. Alexander. I believe we are entitled to have Mr. Alexander.

matters pertaining to the school board and the allegations they have made in their pleadings concerning their role in this whole scenario.

MR. WOOD:

So, if and when he shows up, you will rest after that; is that correct?

MR. BLACKSHER:

Yes.

THE COURT:

All right.

JOHN H. FRIEND

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. WOOD:

Your Honor, this is John H. Friend, sometimes called Jack Friend. He is age forty-seven. He lives at 608 Fairfax Road in the City of Mobile, Alabama.

He is married and has three children. Is that correct, Mr. Friend?

A That is correct.

Q You are president of John H. Friend, Incorporated;

what is that, sir?

A John H. Friend, Incorporated is an economic and market research firm here in Mobile.

Q How long have you been engaged in that business?

A Since 1962.

Q What do you do in that business?

A We perform economic feasibility studies and market research studies and also attitude and opinion surveys.

Q Do you have a college degree, and would you tell us about your college degree?

A I have a B.S. Degree in Civil engineering, and I have a Master's of Business Administration.

Q Where is your Master's of Business Administration from?

A From Dartmouth.

Q Now, where did you work after you got out of Dartmouth?

A My first employment was with the United States Army. Then, I went to work for Palmer and Baker Engineers here in Mobile.

Q What was your position there?

A I was chief economist.

Q When did you go in business for yourself?

A In the very last months of 1961.

Q Would you tell us some of the studies that you h

DAN ALEXANDER

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. BLACKSHER:

Q Give us your name and address.

A Dan Alexander; 3667 Claridge Road, North.

Q Were you born and raised in Mobile, Mr. Alexander?

A Yes, sir.

Q Would you give us briefly a background of your involvement in politics in Mobile County?

A Well, I think that probably the first -- my first involvement was in a minimal way in the '62 Congressional race. Then, I was more fully involved in '64 in a Congressional race, and I ran for the office the first time, myself, in '66, for the County Democratic Executive Committee and, in '68, I ran for a delegate to the Democratic National Convention.

In 1970, I ran for the State Legislature and for the State and County Democratic Executive Committee. In 1974, I ran for the school board.

Q And you are presently a commissioner for the Mobile County School system?

A Yes, sir.

Q What was your involvement in those two early sixties Congressional elections?

A '62, general flunky, and '64, a little more involvement. That was the Tyson race. That was the John Tyson race for Congress.

Q And you were active in his campaign?

A Yes, sir.

Q In which of those races that you mentioned were you defeated in which you were an active candidate?

A Well, I won all of them except for the legislative race in 1970 and I won the Democratic National Convention and the two seats for the State and County committees. Then, I lost in the general election for the legislature.

Q Mr. Alexander, do you consider yourself as a person who is reasonably familiar with politics in Mobile County?

A I would think so, yes, sir.

Q Have you made the statement in this Court before and on the public record in school board meetings that, in your opinion, a black candidate could not win an election running at large in Mobile County?

A That is correct.

Q Most recently -- not most recently, but at the September 1, 1976 meeting of the school commissioners -- I believe that date is correct. That would have been two

Wednesdays past -- did you, in fact, at that time, reiterate your position that a black could not be elected in a county wide race, at large?

A Mr. Blacksher, I know I have said on a number of occasions that, in my opinion, a black could not be elected at this time on a county wide basis.

Q Have any of the other school commissioners agreed with that position on the record?

A I would say that they would generally agree with that, yes, sir.

Q With respect to your Democratic Primary runoff against Mrs. Lonia Gill in 1974.....

A Yes, sir.

Q ..... have you not also said that Mrs. Gill lost the race when you signed your qualification paper as a white candidate?

A I think that was Mr. Voyles that said that, not me, Mr. Blacksher.

Q Would you disagree with what Mr. Voyles said, or Dr. Voyles?

A I would say this, that I would suspect, out of the six people in the race, I would have preferred to run it off against her rather than anybody else.

Q At the start of this trial, Mr. Alexander, your lawyer, Mr. Philips, filed several pleadings and motions, one

of which was a motion to stay pending appeal, a motion to dismiss, and/or sever and those motions were filed at your direction; is that correct?

A Well, they were filed at the board's direction. The board was acting upon my request.

Q All right, sir. You made the motion that these papers be filed?

A Yes, sir.

Q All right. On page three of the motion to stay pending appeal, you are referring to the Act number eleven fifty, passed in the 1975 Alabama Legislature, which had been sponsored by Mr. Kennedy?

A Yes, sir.

Q And you say that passage of this act by the legislature was procurred by Mr. Kennedy with the co-operation of these Defendants.

Now, would you describe more specifically how you rendered co-operation in the 1975 legislature in support of Mr. Kennedy's bill?

A Of course, I can only speak for myself. I do recall, during the period of that legislative session in 1975, that there had been some conversations at the board, at the school board, about the legislation and no one was opposed to it. I don't know of any particular action the other board members might have taken to support it, so I can only speak

for myself.

The first knowledge I had of a pending deal was, I think, just prior to that legislative session in 1975. Mr. Kennedy sent me a copy of his proposed legislation and asked that I give him a call and tell him what I thought about it. I called him and told him that I was not opposed to it, but in its present form, which didn't include a grandfather clause, I would be opposed. I wouldn't help him pass a bill to cut my term of office short or anybody else's.

Q You mean the original form?

A The original form he sent me did not include a grandfather clause. It would have called for an immediate election and I was opposed to that. He has subsequently amended the bill to where all the present board members would be able to run. It passed out of the local committee --let me backtrack one minute.

It came out of the local committee without that amendment with a favorable report with the assumption that it would be amended on the house floor to allow everybody to run for office that was presently on the board. There was a plan that had been drafted by the legislative reference service that would have made a ten member board. One member elected from each of the House districts and that was the amendment that they were going to offer on the House floor.

Of course, I was opposed to that and I made a number

of contacts in the delegation asking that that be defeated.

Q You, in fact, went to Montgomery to discuss this?

A Well, I had other business in Montgomery during this entire period. I did not go up for this specific purpose. But, the only reason for making it a ten member board was to allow all of the present board members to run again, and I showed them a plan that would allow the present board members to run again and still have the five member district that Mr. Kennedy introduced and would assure a black member. We were able to accomplish what the legislative delegation wanted to do without increasing it to ten members.

The plan that originally passed in the House included District two and District three -- now, I am talking about, I think everybody is familiar with the districts on the Kennedy bill -- District two and three would have run in 1976 for a four year term. District two would be the predominantly black district. District three would have been the district that Mr. Williams and Dr. Berger lived in. So, it would have allowed them to run for office again. In '76, District four would have run for a two year term. In 1980, all five districts would have been run again.

Q Are you talking about the bill that was finally enacted?

A No, sir. That was the way the bill came out of the House.

Q All right. I am with you.

A Sometime -- it was the last day of the legislative session, I had occasion to talk to Senator Newman in the Senate cloak room and he told me, or showed me, the Senate amendment to that bill which had, somewhere along the line, changed the black district, District two, to run in 1980. I told him, at that time, that that was not the original intent that I had agreed and we had all agreed with Mr. Kennedy to try to get a black member on in '76. I went to Mr. Kennedy and we came back to Senator Newman and we thought it was going to be changed back, but it never was.

It came out of the Senate with its latter form with District two running in 1980. I do not know exactly how it happened that way, but I know that everybody in the delegation that I talked to had supported a five member district with District two running in 1976.

Q And it was finally enacted with which districts coming up in '76?

A District one and three would come up in '76, as I recall.

Q It might have been three and four?

A It could have been three and four. I know Senator Perloff, at one time, was trying to get District one in there in '76.

THE COURT:

Did that plan add any permanent members to the board temporarily?

A No, sir. It would have ended up in 1980 when everybody ran again for a four year term, it would have done away with the scattered terms.

MR. BLACKSHER:

While the Kennedy bill was being debated, did you express any terms of its being in violation of the United States Constitution on the one man-one vote requirements?

A No, sir. At that time, I thought the districts as drawn would pass the mustard. I had no idea there was a deviation that was probably not acceptable.

Q Did you, at that time, express an objection or notify anybody that in your opinion the bill which was introduced as a local bill was being improperly advertised?

A I had no knowledge of that. I, of course, was relying on Representative Kennedy. I just assumed when he introduced the bill that it was introduced properly, advertised properly, and the lines had been drawn in a way that would be constitutional.

Q Did you, at that time, interject the opinion or make any objections that the Mobile County Board of School Commissioners could not be reorganized without some sort of amendment to the Constitution of Alabama?

A You obviously have reference to section 270 of the

Alabama Constitution which we have had a number of arguments about as to whether or not the legislature has any control over our school board.

Q This point was never raised to any knowledge during this matter in the 1975 legislature.

A The point being, the board was in agreement. The board was in agreement with the legislature and if the legislature, in fact, could not act under 270 to redistrict us, then obviously the school board could accomplish that themselves and, since we were in agreement with the legislation, I see this to hold no problem.

Q Did, at that time, you indicate that, in your opinion, the bill would be in violation of Section 104 or Section 106 of the Constitution of Alabama?

A I am not sure that I am familiar with those two sections.

Q You do have a copy of the bill, I take it?

A Yes, sir.

Q And you did follow the amendments as they took place?

A As well as I could. They were flying around rather quickly up there.

Q And you interposed no objection whatsoever, at that time, that the bill violated the Constitution of Alabama?

A No, sir. The only opposition that I had ever had

once the bill was introduced after the grandfather clause had been put in was to the proposition of the ten member board. That was the only opposition that I ever voiced.

Q Now, in fact, you filed a pleading in this Court, reading again from page three of the Motion to Stay Pending Appeal, that says, that these Defendants were satisfied that a board composed of five members elected from single member districts would satisfy every constitutional requirement and would provide for equitable representation on the board for the black citizens of Mobile County and the rural areas of Mobile County in whose behalf this action was brought; is that correct?

A As I recall, as soon as the bill had been signed into law, we asked to be stricken from this action in this Court because we felt like it was a mute question, at that time.

Q Did the Plaintiffs in this action interpose any objection to that?

A Not to my knowledge. As a matter of fact, it was my understanding that they had imposed no objection to us being stricken from the cause.

Q Did any of the Plaintiffs in this action or their lawyers indicate to you that their objection was based on an opinion that the Kennedy bill was in compliance with the Constitution of the United States?

A I am not real sure I understand you.

THE COURT:

Did it raise any constitutional objection with reference to the United States Constitution to the Kennedy bill?

A The only question I heard raised to the bill came from our in-House counsel, Mr. Stone, sometime subsequent to this Court's striking us from the action.

Q Before we get to that, Mr. Alexander, I will read from paragraph four, again, from the same motion. It says, "Following passage of Act 1150, the Plaintiffs, themselves, then moved this Court to dismiss the Defendants from this cause in essence --" apparently because it said 1150 provided a constitutional system of electing the school board. My question to you, did you get any indication from any of us or our clients that we thought 1150 was a constitutional system of electing?

A I had no contact with any of y'all at all.

Q Thank you. Now, concerning what Mr. Stone told you, when was the first occasion after this bill was enacted that you had some indication that there was something wrong with it?

A I don't remember the exact time frame. I do recall that we got a memo that had -- it was two-fold. It questioned the Constitutionality of the Kennedy bill on a number of points and it also questioned the constitutionality of a tax -- of a

bill that was passed that dealt with some taxes.

THE COURT:

Let me see counsel up here just a minute, will you?

(SIDE BAR CONFERENCE)

(OFF THE RECORD)

THE COURT:

I am going to allow the Plaintiffs to recall Mr. Alexander at a later time.

MR. BLACKSHER:

Your Honor, the Plaintiffs, at this time, conditionally raise their case in chief.

THE COURT:

Yes. Come up here and let me put a little something in the record.

(SIDE BAR CONFERENCE)

THE COURT:

There are settlement negotiations which hopefully will bear fruit between the Plaintiffs and the school board commissioners. Some areas of the questioning of the school board commissioner could get into rubbing some nerves raw with him and with maybe fellow members of the school board. Some areas or the questioning lead to the questioning of the attorneys' fees which have no bearing on the case and the Court will have a separate hearing for that but, in any event, it is agreed between counsel that it would be best to delay

any further questioning of Mr. Alexander or cross examination until they see whether or not the pending negotiations bear any fruit.

Charlie, you haven't been in there, but needless to say, this is real confidential.

We will call him back later.

(IN OPEN COURT)

MR. WOOD:

Your Honor, are the visual slides any help to the Court?

THE COURT:

They are. I agree with you. I was using this, but it might be easier for him to testify with those large things. You may proceed either way.

MR. WOOD:

All right, sir. We will continue on with the slides.

JOHN H. FRIEND

the witness, having been sworn earlier, took the stand again and testified as follows:

CONTINUED DIRECT EXAMINATION

BY MR. WOOD:

Q Now, Mr. Friend, I think we were turning our attention to page sixteen and I would ask you if you had done some

A Yes.

Q And he also got the most votes in the dominant black ward?

A Yes.

Q And then I noticed that you don't have the general election. Why is that?

A That would have been an uncontested race.

Q And Mr. Haas became the commissioner?

A Yes.

Q All right. In that same format, you followed that all the way through to the present day for County Commission election?

A To the 1976 primary runoff, the recent one, yes.

Q All right, sir. How many times have the dominant black wards voted for the candidate receiving the most votes?

A Since 1960, there have been twenty-seven races. In nineteen of those races, persons in the black wards, the dominant black wards, voted for a winner.

Q What significance, if any, do you place on that?

A Well, I think, first of all, that it is evidence that the black vote is significant in elections.

MR. STILL:

Objection, Your Honor. He is giving a political science opinion.

THE COURT:

'72 election?

A The 1972 Presidential election. In other words, the source for which the government compiles its figures.

THE COURT:

And your source is?

A The source is the United States Department of Commerce.

Now, 1972, according to my figures, in Mobile County, blacks were registered at sixty-two percent of the voting age population.

Q All right. What do you have for whites?

A Now, the whites in that same year in Mobile County were sixty-five percent.

Q All right. Now, what is your figure for the southern region?

A In the southern region in 1972 --

THE COURT:

Just a minute. This is Mobile?

A Mobile County, Your Honor. In the southern region in 1972, blacks were registered sixty-four percent.

THE COURT:

That is the voter age population?

A Yes, Your Honor.

MR. WOOD:

Do you have a figure for the whites?

A Whites were registered seventy percent.

Q Do you have a national average?

A Yes.

Q National figure?

A In the entire nation in the 1972 Presidential election, the general election, at that time, blacks throughout the nation were registered sixty-five percent.

Q How about whites?

A Whites were registered seventy-three percent.

MR. BLACKSHER:

Your Honor, for clarification, the Mobile County figures were not the Department of Commerce, were they?

A No.

THE COURT:

Where did those figures come from?

A Those were my estimates, Your Honor.

MR. WOOD:

Mr. Friend, do you know how many blacks, total population, reside in the Mount Vernon census tract that we had some discussion about?

A I don't have that figure right at my fingertips. I do have it in my data, the total number of blacks. I can dig that out.

Q Do you know whether or not the inmates of Searcy are included in those population figures?

county.

Q So, we should multiply, you say, multiply one three nine six times three; is that correct?

THE COURT:

Well, you are not taking into consideration the black voter. You are just talking about the black population, aren't you?

A No, the black voter, too. In other words, if there were "x" number of votes in the dominant black wards and the dominant black wards contained thirty-three percent of the total population, you could roughly expand that to expand the total black population, assuming they were voting the same way in the total population as they were in the wards.

Q That is based on the assumption that the people out in the county vote, first of all, exactly the same way as the people in the central city and, secondly, on the same level; isn't it?

A It's assumes that the people -- that the blacks generally vote the same way whether they are in the county or the city. Now, there is some difference, I would think, between black turn out in the county and in the city, but I don't think it would be appreciable.

Q So, if we accept all of those assumptions, what do you say the answer is?

A I am saying that the blacks are very definitely

acting as a pivotal vote in many county elections.

THE COURT:

We were talking about Stephens. You say if the vote had been reversed, his opponent, for what Stephens got, Stephens would have lost?

A Yes.

MR. STILL:

But you don't have any hard statistics. You just have this extrapulation in made in 1960, right?

MR. WOOD:

Your Honor, I object to him arguing with the witness.

THE COURT:

Well, I understand the basis that he has put it on. Go ahead.

A Yes.

MR. STILL:

What other races do you say blacks were a pivotal vote or made the difference, whatevever you want to call it?

A I think in the 1960 primary runoff place one, Haas and Hailey.

THE COURT:

1960 what?

A Primary runoff. We don't have the other man's name.

MR. STILL:

Haas's margin of victory was ninety-nine hundred

particular race. Then, in -- then, probably in the 1972 primary, I think that the Langan-McConnell race would have shifted around. The actual vote Mr. Langan got was about sixteen thousand. Mr. McConnell got almost fourteen thousand. Where you have close races, this becomes a very distinct possibility.

I think in the 1972 general election there between Smith and Waller, place two, it probably would have switched. Then, in the 1976 primary between Wiley and Bridges, I think it would have changed it there had they shifted. In the 1976 primary runoff between Wiley and Bridges, I think it would have changed it again.

The vote for Mr. Wiley in that election, as you recall, was twenty thousand three hundred and forty-seven and, for Mr. Bridges, it was twenty thousand fifty-three. It wouldn't take an awfully lot there to change that vote, but it probably would have.

Q So, you are saying that some of the candidates who won would have lost if the blacks hadn't voted for them; is that right?

A What I am saying is that had the blacks reversed their voting pattern --

THE COURT:

Gave what vote they gave rather than the person they gave?

A Yes, the two top men, it would have changed it. This comes as no great surprise to me. In my experience, I have found that this is something that candidates are very much aware of in the Mobile area; that the black vote counts.

MR. STILL:

By reversing the votes, you mean, if a candidate got seventy percent of the black --"A" -- and candidate "B" got thirty percent, by reversing that, give thirty percent to "A" and seventy percent to "B"?

A Yes. Turn it around and do it the other way.

Q How many times would the result of an election have been changed if the white vote had reversed themselves?

A This, I did not compute.

Q You did not compute it?

A No.

Q You weren't interested in that?

THE COURT:

Let's don't get into that.

MR. STILL:

Well, don't you think that --

THE COURT:

Each one of these witnesses, yourself included, took and did what the people hired told them to do.

Let's go ahead.

MR. STILL:

September 16, 1976 9:00 o'clock. A.M.

MEYER PERLOFF

the witness, having first been duly sworn to tell the truth, the whole truth, and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. WOOD:

Q Are you Meyer Perloff, also called Mike Perloff, age forty-nine, married with three boys, live at 304 Garden Lane Apartments in Chickasaw -- or, Judge, this is Mr. Perloff. He is a practicing attorney in Mobile. He was a member of the Alabama House of Representatives from 1964 to 1974. He is a member of the Alabama State Senate, elected for a four year term in 1974, and he represents senate district thirty-three here in Mobile County; is that correct, Mr. Perloff?

A I am now fifty.

Q All right.

THE COURT:

That is a hard admission.

A It is the truth.

MR. WOOD:

Would you tell us briefly where Senate District

thirty-three is?

A Yes, sir. It runs from, oh, I guess, Springhill Avenue in Mobile to the northern most part, I think it is by, oh, Sarah Road in Saraland, Alabama. I mean, that is the north-south boundaries. East-west, oh, from the river to passed Eight Mile in the west.

Q How would you characterize the racial composition of that district in terms of population?

A You mean now or at the time of the election?

Q Well, at the time of the election?

A I think it was fifty-six percent black.

Q All right. As a single member Senate District, we are talking about in the 1974 election .....

A That is correct.

Q ..... did you use any racial campaigning in that -- let me ask you this first. Did you have a primary?

A Yes, sir.

Q Who were your opponents and give us their race, please.

A I had two black opponents, Mr. Buskey and Mr. Rembrandt, and one white, and that was Arnold Black.

Q Who made it to the runoff?

A Mr. Buskey and I.

Q Naturally, you won the runoff?

A Yes.

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at lunch.

Senator, let me show you Defendant's Exhibit number 10 for identification and ask you if that is a copy of that newspaper insert?

A Yes, sir.

Q Was this used in the runoff between you and Mr. Buskey?

A It was.

Q Would you explain to the court what a newspaper insert is?

A Well, it is an idea that, as in any political campaign, it is name identification, and they get people to recognize your name when you go into a voting booth. During the primary, I used direct mail to mail material to everybody in the district. As a matter of fact, I had two mailings. One was a labor tract. In other words, something directly to my having supported organized labor during my term in the House, and this was mailed to every labor member in the district.

Q Black and white?

A Yes. I had no idea who was black and who was white. It went to everybody and then I had a mailing to every householder in the district, black and white. I had no idea. It went to everybody. This direct mail was the single most expensive item in the primary. I learned after the primary that Douglas Johnston had used something similar to this in his

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had to get some black votes. They got me by twelve percent. It is only racy if I do it, not if he does it.

Q How many black votes either in total number of percentage did you get?

A I had to get at least ten or fifteen percent. I couldn't win without it.

Q During the campaign, was the issue or accusations or ever made that you were using race as an issue?

A Not to my knowledge, no. Now, I don't know what Buskey was doing.

Q Did anyone ever accuse you or come to you with complaints that you were using racial campaigning?

A No, sir.

MR. WOOD:

Your witness.

A I think if that had happened, I would have lost my black support.

CROSS EXAMINATION

BY MR. BLACKSHER:

Q Which amounted to twelve percent of the black vote, Mr. Perloff?

A I got more than that, sir. I won.

Q Mr. Perloff, did you say you got twelve percent of the black vote?

A No, sir. I said between ten and fifteen.

Q You now say between ten and fifteen percent?

A I said there were twelve percent more black than white votes in that district. It was fifty-six to forty-four, Mr. Blacksher.

THE COURT:

Was that population or registered voters?

A I don't know, sir.

THE COURT:

I understood you to say that the black population was that. What about the registered voters?

A I have no idea, Judge.

MR. BLACKSHER:

So, you considered, as a white candidate, getting between ten and fifteen percent of the black vote, a successful campaign?

A I won. That is a success.

THE COURT:

We are getting into an argument now. Let's go ahead.

MR. BLACKSHER:

All right. Do you know how much of the white vote Mr. Buskey got?

A No, but I can tell you, sir, I don't know about percentages, he got at least a hundred and ten votes in Chickasaw.

Q A hundred and ten votes?

A That is all white. That is in Chickasaw. That is out of nineteen hundred.

Q Would it surprise you if we told you that there were Exhibits in this Court that there were some blacks living in Chickasaw, census data?

A I will tell you this, Mr. Blacksher, none of them voted that day that I know of, because if they had, I would have heard about it.

Q You were checking to make sure that there were no blacks voting there?

A Don't be ridiculous. That would have been a subject of conversation.

THE COURT:

Don't get into that.

MR. BLACKSHER:

How can you be so sure?

A I was there in Chickasaw a considerable amount of the time that day.

Q That was the heart of your support, right?

A No, sir. My support was Eight Mile and Saraland.

Q Which is also all white?

A Saraland is not-

Q You didn't campaign in the black community?

A I beg to differ with you, son.

Q Tell me where you campaigned in the runoff.

A All right. Right there on -- not Celton Beach. There is a triangle that comes right there at the highway, and I have forgotten the name,-- for the life of me, I can't remember the name of the road. Right down there, I guess, a hundred and fifty to two hundred feet is a black nightclub, and I went in there and I spoke. The black owner of that nightclub --

Q Spoke to the black owner?

A Yes, sir. He is a community leader out there, you know.

Q Oh, I see.

A In order to get to the black votes.

Q So, in order to get to the black votes in Sarland -- in order to get to the black votes in Sarland, you went to see someone you considered to be a black leader to ask him to get out the black vote?

A I asked him to help me.

Q Thank you.

A I didn't want him to hurt me.

Q Now, you say you had some blacks in your campaign?

A Yes, sir, I did.

Q To work in the black community?

A Yes, sir, I did.

Q Why didn't you send them out into the white

community?

A I had whites out there in the white community helping me.

Q That answers my question.

May I see Exhibit 10, please.

A Each man does the best he can.

Q With what he has to work with.

A That is correct, sir.

Q What you have to work with is the electorate of District 33, right?

A Yes.

Q And we all have to face the facts of life, right?

A Yes, sir.

Q What it takes to get the white folks vote and the black folks vote?

A That is correct. If you run in a biracial district, you have to worry about that.

Q Mr. Perloff, whose idea was it to run Mr. Buskey's picture in your campaign handbill; that wasn't Mr. Johnstone's idea, was it?

A No. I didn't discuss this with Johnstone. I told you I got the idea of using this from Doug Johnstone. He used it in the primary respectively and, as I told you -- told Mr. Wood, just a few minutes ago, it is one heck of a lot cheaper.

Q Did Mr. Johnstone tell you that it was a good idea to run a picture of your opponent?

A I did not discuss this with Mr. Johnstone.

Q Again, I asked the question. Whose idea was it?

A I don't know if it was any one person's idea, as such. We were trying to determine --

THE COURT:

Was it with your approval?

A Yes, sir.

THE COURT:

All right.

MR. BLACKSHER:

Can you tell me in your recollection --

THE COURT:

Let me ask you this. Did Mr. Johnstone run the picture of his opponent in his paper?

A I don't know, sir. I had heard that he did. I may have seen it, but I just don't recall.

MR. BLACKSHER:

Can you tell me this. Can you tell me one other candidate in the '74 election who you know ran a picture of his opponent in his campaign advertisements -- one other person?

A Mr. Blacksher, I can only answer you this way, that the only person who I was concerned with was me. Now, I don't

THE COURT:

I don't recall.

MR. KENNAMER:

The Hoodlum Herald?

THE COURT:

Well, I guess that is about right. I distributed for whoever paid me.

A If Mr. Buskey had hired him, they would have distributed it for him.

THE COURT:

I had a friend to tell me to put part of them in the sewer, but I resisted that temptation.

A That has happened to me, too.

MR. BLACKSHER:

Did you vote on a bill that would change the at large system in Alabama to a single member?

A Yes, sir.

Q Tell us which one.

A The school board bill.

Q When was that?

A '75.

Q How did you vote?

A I voted for it.

Q Were you aware at the time you voted for it that it was likely to provide an opportunity for a black person to be

elected to the school board?

A Yes, sir. Cain Kennedy told me.

Q Did Mr. Kennedy have to tell you what the effect of it --

A No, I think I am smarter than he is.

MR. BLACKSHER:

So, you have known for some time any time you change the at large system for the school board or County Commission or City Commission into a single member district plan, it is more likely?

A Yes, sir. As you well know, I tried to get one for the City Commission that you were opposed to.

MR. BLACKSHER:

That is all I have. Thank you.

THE COURT:

Any other questions.

CROSS EXAMINATION

BY MR. PHILIPS:

Q Senator Perloff, the bill Mr. Blacksher just asked you about, Mr. Kennedy's bill in the 1975 legislature, at the time that you voted for it and at the time it passed, you were also aware that it would insure the election to the board of someone from the north part of the County, too, weren't you?

A That is correct.

THE COURT:

I will let them present it as they see fit. Go ahead.

MR. PHILIPS:

Thank you, Your Honor.

JAMES EVERETT VOYLES

the witness, called on behalf of the Defendant, School Board, and after having first been duly sworn to tell the truth, the whole truth and nothing but the truth, took the stand and testified as follows:

DIRECT EXAMINATION

BY MR. PHILIPS:

Your Honor, this witness is Dr. James Everett Voyles. He has a Bachelor of Science Degree from Brazier College in Owensburg, Kentucky, where he majored in political science and his minors were english and history. He has a Master's Degree from the University of Mississippi where his major was political science and his minors were sociology and intellectual history.

He did further graduate study at Emory Univeristy in political science. He has a Doctorate from North Texas State University and his major was political science with concentration in survey research methods, public law, public administration theory, comparative government and american government and a minor in statistics and American history.

A Yes. I think that is possible.

Q All right. Are you familiar with John Klubox's article "The Manipulated Negro Vote", which appeared in the journal of politics in 1974?

A Yes, sir.

Q In that article he describes what he terms an independent bargaining group?

A He was attempting to describe ways that blacks were able to participate in voting. Well, I should say in the political process prior to the time they were able to vote in great numbers. The use of the independent bargaining town was one way. In this particular situation there was a small highly identifiable group of black voters who were able to bargain with the white leaders in the town, the white politicians in the town, for favors in return for what amounted to a block vote.

Q All right, sir. Do you think Mobile, in the 1960's, would fall into that classification of independent bargaining town?

A Yes. I think it might well do so. In fact, the situation in the 1960's in Mobile, the voting numbers of blacks, were much less before the 1965 voter rights act than afterwards as we all know. The black vote was highly influenced by the endorsement of the Non-Partisan Voters League and it would seem that the leaders of the black community in the Non-Partisan

Voters League, particularly Mr. LeFlore and the others in the steering committee or screening committee, were able to use this endorsement as a means of bargaining for various policy things that the black community wanted; particularly, in terms of their success in electing Mr. Langan to the City Commission.

Q Have blacks in Mobile County ever constituted what would be characterized as a swing vote or is that part and parcel of the independent bargaining town concept?

A Well, swing vote is part of that. Obviously, the more power a block of voters have, whether we are talking about a black group or union vote or any type of identifiable group, has depended upon, obviously, the turn out and the way the vote is going in the rest of the community. If the rest of the community is displaying the vote pretty closely, then any group that can bring a sizeable block vote into the political picture has a great deal of power and that is one of the reasons, in local politics, the labor unions generally do not favor the electoral college. It gives the labor unions a great deal of power with the winner take all electoral college situation, and that is somewhat what is being displayed here on the local level.

Q You say played here on the local level. Do you mean by the black vote?

A Yes. I think so.

Q Black leadership of the community?

A Yes. I think it was a very wise political move compared to registration of blacks and whites, particularly in the early sixties.

Q Now, as the registration of blacks continues to grow, could the swing vote become an even more significant factor?

A Yes. It could, but I think also another facotr is happening. Without a doubt, as any groups potential vote increas they become more powerful in the community, but also, as that vote increases and more members of that particular identifiable group are able to register and vote, the group becomes much more difficult to influence or control.

Influence is probably a better word in terms of what the pink sheet is doing, because you begin to have a wider diversification of the voters even within that identifiable group. Thus, I think some people have testified here before that the endorsement of the Non-Partisan Voters League is not nearly as powerful in terms of percentage that you get in the black community as it was in the early 1960's.

Q All right, sir. As we move from the 1960's into the 1970's, don't you also find the development of other cohesive groups within the black community, such as the voting -- I forget the name of the group. There was earlier testimony about the group in Prichard?

A Yes, sir. I think it is the VRO.

Q VRO; yes, sir. So, as those groups would increase,

then you would still have the overall increase in the swing vote potential in the black constituency?

A Yes. As an identifiable group, yes. I don't want to mislead you. The endorsements by these groups are still very important, both the Non-Partisan Voters League and the VRO still account for a great amount of influence and greatly respected in the black community.

Q Have you ever had occasion to observe, Dr. Voyles, when there is one strong force or, I guess maybe it is back to the old principle, every action produces a reaction. Have you observed a phenomena of reaction from strong cohesive black vote?

A I am not sure what you are getting at.

Q Well, in terms of an action of a block voting that becomes apparent, is that likely to produce a reaction in other areas of the community?

A Yes. I think it actually produces a reaction in a number of areas. I think there was a reaction in the 1960's in the white community to the black vote. Particularly, I think this culminated in the 1969 race where Joe Langan was running against Joe Bailey.

I think it is fair to say there has been some reaction in the black community that other groups and other leaders have come forth to challenge the old traditional leadership patterns in the black community.

A Yes. The expense of an election is really two-fold. One, determined by the type of office, which candidates are running and; secondly, by the opposition.

Now, if a person was running from a single member district such as a legislative district, he could still spend a great deal of money. If he had opposition that was strong and spending money, because the real expense in campaigning is media costs, newspaper, television, and to a lesser extent, radio. If you go down to buy an ad on one of the television stations or with the daily newspaper, the Press Register, you have to pay for all of the coverage of the County. You don't just buy it for a particular area.

The television stations couldn't just beam our ad to Tillman's Corner, for example. You would have to buy it for the entire market area, regardless of the number of voters in any particular area we are trying to get. The cost wouldn't go down substantially. I suspect, if we checked the records at the Probate Court we would find district races where they spent as much money as candidates for County wide office.

Q There has been some speculation that the cost of the School Board campaign would vary somewhere between twenty-five and thirty thousand dollars?

A Of course, you can spend any amount of money you want to. I don't think anyone has ever spent that much money. It would be very foolish to do so.

It is a non-paying job with no real political power. I would say a top figure of four and an average of two or three

Q In your campaign, what did you spend in your campaign?

A I am not for sure. I don't have the records, but I would guess at not more than two thousand and probably less.

Q Dr. Voyles, were you involved in the 1970 Brewer-Wallace campaign for the governorship?

A Yes, at somewhat a minor level. We had the responsibility of putting together the primary work on the ward organization for the Brewer campaign. This consisted of starting some six months prior to the kickoff of the campaign with a staff primarily recruited from the student body of U.S.A., getting names and addresses from the voter's list and matching them with the telephone directory and putting them on cards.

After the campaign started, I did various jobs in the campaign, which consisted of mostly going around and running errands and that type of thing.

Q In the 1970 School Board race, were you involved in that campaign, in some way on behalf of Jackie Jacobs?

A Yes, sir. I supported Jackie Jacobs and did a little work on her behalf.

Q During that time, Dr. Voyles, was there a considerable speculation that Mrs. Jacobs was put on the ballot to bring out a larger black vote, which was expected to go to Mr. Brewer?

MR. STILL:

Alexander in that race?

A No, not unless they had been willing to spend a large sum of money. As I mentioned to you in conference, I was involved in several other campaigns as a professional campaign person, besides that particular race and we were doing some polling for the various candidates, particularly for Bill Roberts, and we found that -- I tested some of my own questions on polls and found that name identification, that Dan Alexander had compared to the others in the race made it virtually impossible for anyone to beat him, unless they were willing to spend about thirty thousand dollars, which is unrealistic in a school board race.

Q In a school board race like that where it is a non-paying position and you normally don't spend a great deal of money, isn't name identification an extremely important factor?

A Yes, sir, without a doubt, I think the school board race is where there are really no issues. Everyone is for better schools and better conditions for the children and all the various things.

It is not the type of race you can spend a lot of money raising issues. So, I think name identification is the major factor.

Q How do you acquire that name identification, doctor? Do you acquire it in one part by running for election?

A Well, of course, that was what Mrs. Drago did. I think

that is the way you do it. You run the first time and the second time and hope eventually the voters will recognize your name and when they go in, they will vote for you.

Q Another way to acquire name identification is by a close contact or close association with some dominant and popular statewide political figure like, say, George Wallace?

A No doubt, in a minor race, identification and/or endorsement by a major popular figure which certainly would help you. Voters don't have a great deal of information to vote on in minor races.

Q All right. Would another factor in this acquisition of name identification be simply visibility in the total count by association with groups, by civic club work seeing the other sources that are available to someone to become well known throughout the county?

A Oh, certainly, activities of that sort would help.

Q Did you identify any particular -- in your polling having to do with Mr. Alexander, did you identify any particular factor or source of name identification that seems to be dominant?

A No. We didn't go into that type of thing. I was tying the question onto polls that was being run for other candidates. We simply did a name I.D.factor.

Q Now, the total effect was a strong name identification with Mr. Alexander?

A Oh, definitely. He was well known in the County.

A Yes.

Q What are elections of comparable significance to City Commission elections?

A What I am trying to do, Mr. Still, is distinguish somewhat between the elections where there are issues, large budgets, vigorous campaigns as opposed to elections where there are not very much issues and very limited budgets and so on.

Q There aren't very many issues in School Board elections, are there?

A No.

Q Your statement about race and income are highly correlated with turn out would not necessarily be true in School Board elections?

A I haven't run it on School Board races. So, I don't know, but I suppose not.

Q All right. Now, in talking about Klubox study on the manipulated negro vote, he came up with a typology in which he divided cities with negro populations in four different classifications, wasn't it?

A Yes, sir.

Q What were the four classifications?

A I couldn't tell you without the notes.

Q One of them was the independent bargaining town?

A Yes.

Q You say Mobile was like that in the sixties?

A Yes. I think we would fit well into that classification if we compared it with the article.

Q But Mobile is not like that now; is that correct?

A I would say it is certainly becoming less so. It would be very difficult to fit that category right this moment.

Q Then I believe you testified that there was a reaction in the sixties against the block vote of blacks?

A Yes.

Q And previously to that, you had said that the block vote was a very good political tactic, given what blacks had to work with, at the time?

A Yes.

Q Now, what blacks had to work with, at that time, wasn't it a situation in which there were very few blacks registered to vote, because of literacy tests, poll taxes, opposition on the part of white officials and those were factors of the political situation that blacks had to work with, at that time, weren't they?

A Well, at least there were relatively few blacks registered for whatever reasons.

Q At that time, if there was any effort to organize a black vote among blacks, it was because they were abnormally low in the political electorate as compared with the population at large, isn't that true?

A Yes. Of course, this was the theory behind it.

Q So, then, a reaction against the block vote, as it is called, would be a reaction against blacks having very much political power, wouldn't it?

A I think the reaction was against the civil rights movement of the sixties.

Q What is the difference between the civil rights movement in the sixties and blacks having political power?

A It wasn't a difference in political power. As you know, it also involved socio-economic things. It was what we kind of refer to as the southern way of life.

The end of segregation, end of segregated facilities, and that type of thing which I think was probably more meaningful to people than whether or not blacks were able to participate some way in the political system. They may have interpreted it to bring this about quicker.

Q So whites resisting the socio-economic gains of blacks reacted against them by voting against them at the polls; is that correct?

A Yes. I think that is correct, and would have happened for any other group, I think, the disrupted social system.

Q And so, would you say that at any time in the future when there is a feeling on the part of a great number of white voters that blacks are threatening them in a social or economic way that they will react again by voting against their interest at the polls?

A I think any time anyone is threatened by any group there will be some reaction to it; perhaps even voting, talking about blacks, or labor unions or anything else. I think it would be more difficult now for any of this white reaction to find a great deal of political support simply because of the things we have been discussing here. That is, there is a sizeable number of black voters now. Voting roles are open to blacks and they represent a goodly portion of the potential vote in Mobile County. You cannot simply discard roughly a quarter to a third of the vote.

Q Now, when was it that that V.O. Key published Southern Politics?

A I believe 1947, I think.

Q As long as we both guessed the same thing, I suppose we can work on that.

V.O.Key found, did he not, that the central issue of southern politics was race?

A Yes.

Q Not very many blacks could vote in 1947, could they?

A That is correct.

Q Were blacks making any social pressures or economic pressures on whites, at that time?

A In some areas, I think they were -- but, no, they weren't really.

Q In the whole electorate, it wasn't perceived, was it?

Q Wiley and Bridges were very close together in the number of votes that they got in the black wards, weren't they?

A Yes.

Q Now, in previous campaigns, in order to run ads in the runoff, say, my opponent got the block vote, you have to be able to publish a table in the newspapers showing that your opponent got a lot more votes in the black neighborhood than you did?

A Oh, without a doubt.

Q But Wiley and Bridges were so close together if one of them had wanted to do that, they couldn't have done that?

A Yes. It would have been ineffective.

Q Now, you were helping to run the media campaign of Mr. Wiley, weren't you?

A Yes.

Q And you paid attention to the media campaign that Mr. Bridges ran, didn't you?

A Yes.

Q And I believe Mr. Bridges, who was a former sheriff ran ads stating that Mr. Wiley had been sued for discrimination in the skating rink that he owned; is that correct?

A He ran at least one of those ads in the Mobile Beacon which is aimed primarily at the black audience.

Q Did he ever run that ad in the Press or the Register, to the best of your knowledge?

A No. I don't think he did.

Q So, he ran an ad stating that his opponent, Mr. Wiley, had discriminated against blacks, but he ran it only in black media; is that correct?

A I believe that is the case, yes.

Q I believe Mr. Wiley ran some ads against Mr. Bridges which accused Mr. Bridges of discriminating against blacks on something he had done in the sheriff's department, didn't he?

A I think we implied that.

Q Where didyou place those ads?

A Primarily in the black media.

Q In the black radio stations and the Mobile Beacon?

A Right.

Q You didn't run it in the white media, did you?

A No. There was no reason to.

Q There was no reason to?

A No, because on advertising, political advertising, you try to pinpoint your audience as much as possible. That is, which audience will this particular ad affect to get the most for your money.

Those ads were effective, we thought, more effective in the black community and I am sure Bridges did too. Also, media costs for the black radio stations and the Beacon are much, much less than say the Mobile Press Register or stations like WABB and WUNI and so on. There is a dollar factor and that

is a political cost efficiency formula, too.

Q You didn't run it in the Press or in the Register because white people wouldn't have been very interested in whether or not Mr. Wiley had discriminated?

THE COURT:

I think that is obvious. He has answered that.

MR. STILL:

Now, in terms of cost of running in a single member district, you stated your opinion that it is about the same as running countywide; is that correct?

A I don't think that there would be any real substantial difference. There would be probably be some difference. You would save some on literature and obviously on gasoline and that type of thing if you ran a media campaign.

Q If you ran a media campaign?

A Yes.

Q If you have a highly urbanized district that you are running in, a district in which you can do door to door campaigning and in which there is a lot of neighborhood meetings, you can go -- you may not need to do a lot of media advertising, right?

A Two points; One, if your opponent would do so you would have to, given equal door to door participation by the candidates, I would put my money on the guy that ran the media campaign.

Running on the second point, I think there is some justification.

THE COURT:

Let me see if I understood you correctly. Did I understand you to say that you thought media campaigning was better than door to door?

A No, sir. I said if they are both doing the same thing and you add the additional factor.....

THE COURT:

Oh, I see.

A And the second point, media campaigning is also an educational process. I happen to live in the district where I understand the two candidates, Mr. Cooper and Mrs. Edington agreed not to run a media campaign, but that was probably one of the least informative campaigns I have been able to participate in or judge.

Simply going door to door you don't have much opportunity, really, to present your platform and discuss the issues and this type of thing. You have to hit "x" number of houses a day.

Q All right. Now, another type -- well, let's go back for a second to that.

You heard Mr. Buskey, or did you hear Mr. Buskey's testimony?

THE COURT:

Let me ask a rather interesting question. Did I understand

you to say that media campaigns are informative?

A I think they inform.

THE COURT:

All right.

A Perhaps what each side wants the audience to hear.

MR. STILL:

They get your promises across, is that what you are saying?

A I think you are trying to present the best case.

THE COURT:

Aren't there rather some interesting discussions of that going on in the national television about the presentation of candidates or the selling of candidates?

A Yes. I have my own theory on the thirty-second commercials.

THE COURT:

Go ahead.

MR. STILL:

I think Mr. Buskey, the record will show, testified he spent around twenty-five hundred dollars on his campaign?

A Yes.

Q And you are saying he probably didn't have to spend any more because there was no pressure to spend any more from anybody else and the House District 99 race is what I am talking about?

A Yes. I would be surprised if his opposition spent any

more than that.

Q In '72, Mr. Buskey was running against Mr. Perloff and Mr. Perloff testified that, among the campaign publicity that he used was a brochure which looked like a tabloid newspaper, four pages, and he had previously run two direct mail campaigns to everybody in his district.

Now, if you ran a direct mail -- well, first of all, the theory of direct mail campaigns is that they seem a little more personal than an ad in the newspapers; is that correct?

A Depending on how you do it, but, yes, that is the theory behind it.

Q Presumably, but if you can get somebody to open it, the theory is it is a little more effective than say a newspaper ad?

A Yes.

Q All right. Now, if you are running -- trying to run a legislative campaign, let's say, in all of Mobile County, you have to send out, if you are going to do that, direct mail campaign, you have to do that to every house in Mobile County unless you get specialized lists, don't you?

A Well, of course, you can get specialized lists. There would be about sixty thousand houses, head of households.

Q In a legislative district, for instance, how many households would there be?

A I don't know. We did this for Bill Roberts in the

Senate district, but I can't remember the numbers we sent out. It would be obviously less.

Q So, it would be less in a single member district than in a multi-member district?

A Yes. But in all honesty, it is too expensive.

Q And it may not get there until after election?

A Yes. That has happened a few times, too.

Q Now, various election systems, depending on the context in which they are used, can dilute one group's vote or cancel out one group's vote, can't they?

A Yes.

Q And you talked about single member districts. There is a possibility they can be gerimandered?

A Without a doubt.

Q I think you identified gerimandering as one major form of dilution of the vote?

A Yes.

Q You spread your opponent's vote -- let's assume we are in power. We spread the opponent's vote around so they can't get a majority in any district; is that correct?

A Yes. That is a very effective way of doing things.

Q In multi-member elections, you can also have a dilution of the vote simply by having a situation in which a minority is unable to elect anyone, can't you?

A Yes.

MR. BLACKSHER:

Your Honor, we are trying, in part of our case in chief, to establish, as best we can, whatever is the legal authority for the Board of School Commissioners and the current method under which they are elected and the only way I know to do it is since counsel was unwilling to turn over this information to me through discovery is to try to put it on through this witness, who was a member of the Board of School Commissioners and a lawyer and to present this evidence to the court and try to find out, because we do not know.

We can't tell, on the record, whatever is the legal authority for the School Commissioners.

MR. PHILIPS:

Your Honor denied them knowing, on discovery. We set out fully, in our pre-trial memorandum, the citations to act after act after act from the beginning of the School Board to the end, up to this point in time.

THE COURT:

The only trouble is he may disagree with that. He may not agree with that. Go ahead .

Well, just a minute. Gentlemen, if I am wrong, call it to my attention. The only relevance, it seems to me to have is as to whether or not the authority of the School Board, if there is tenuous statewide policy in at large elections.

MR. BLACKSHER:

That is correct.

THE COURT:

If it bears on that, all right. But if it does not, I don't see any reason in going into it.

MR. STILL:

That is the reason we wish to go into it.

THE COURT:

All right.

MR. BLACKSHER:

On pages three hundred six of your trial memorandum, of your lawyer's trial memorandum, Mr. Alexander, there is a discussion of the constitutional legislative basis of the Mobile County Public School system that begins when Alabama was admitted to the union in 1819; the 1826 Act of the Alabama Legislature establishing a public school system in Mobile County proceeding- through several other acts up through the 1901 Consitution which, of course, according to our brief, restated the constitutional authority or basis of the Board of School Commissioners of Mobile County and, ending with reference to an Act number 1919, Local Act 1919 of the 1919 Alabama Legislature which established a Board of Schoool Commissioners composed of five members elected by the voters of the county, at large, for staggered six year terms and that is the end of the discussion, in your brief, of the statutory authority for the Board of School Commissioners.

on blacks, but that the plaintiffs had the burden of showing that the District of Columbia was using it intentionally to discriminate against blacks in their hiring processes. And, of course, that was a case where the plaintiffs were trying to prove they didn't have to show intent. They came in to court, told the court we are not making any effort to do that. We think just because it has adverse impact that it is unconstitutional.

Now, the City is, in essence, saying in its brief that in light of that case we have to show that 1911 was the act creating the City Commission, and was an act that the legislature of Alabama had a smoking gun in their hand, that they did it for the motivation of diluting the black vote. Of course, we know we can't show that, because all the evidence shows that blacks were already disinfranchised. That could not have been the prevailing motive, at any rate, for the action taken by the legislature, at that time.

The same thing applies to the 1901 act that changed the County Commission system to an at large system. The same thing applies to whatever time or whatever act that constitutes the present form of election for the school board. I think the one the school board most recently relies on is 1917, but I ask your Honor to consider what that argument would mean if it were accepted on its face. It would mean

that if the state comes in and shows that at the time it started some state policy like that, it didn't have to concern itself with the unconstitutional impact it would have on folks fifty years from then. It could maintain it forever. It would just about totally destroy the concept of law as we know it now.

For example, what about the one man one vote principle? Under this theory that is being advanced by the Defendants, if the legislature reapportioned itself in 1960 and said it did it with the intention of providing every man, each person, the same vote and ten years later it was shown that the districts were out of proportion, they could come in and say we didn't do it intentionally. It would totally undermind the whole concept of one man one vote. Well, it is absolutely no different with respect to the racial discrimination in the electoral process. On that point, the evidence is chock full of testimony of how completely and fully all the politicians in Mobile County understood the important fact the at large system has on black voters and their ability to have their choices elected. The evidence is also full of example after example of how the legislators of Alabama had the opportunity to consider and did consider putting in single member districts as early as 1963 in the city and certainly most recently in the last two years, in

saying the law governing this circuit is Emma versus McKeith.

I will briefly consider each of the zimmer factors and tell your Honor our position on what the evidence shows. First of the four primary factors is the slating and candidate selection process and here, I think, the issue is clear. The Gadsden County case dismissed that factor in Gadsden County solely on the fact that the Democratic primary was an open primary and said, well, that shows that they don't have a slating process. What, in fact, the Fifth Circuit was saying, though, was that in Gadsden County where fifty percent of the electorate or more was black, the open primary did not bar access of black candidates to the electorate.

I think that the better view, in the context with this case, is the one taken by the district court in Shrevesport, Louisiana, in the Bull versus Shreveport case, which says the Court has to look past form and into the substance of the system. Your Honor, I don't think there is anything more clearly established in this case than the fact that that black candidates, qualified black candidates, are uterly discouraged from running for office in either the city, county commission, or the school board so long as the electoral system remains in the at large form. Every black politician who came before your Honor, including some like

Mrs. Gill who said they would never do it again and the reasons for it are obvious. The reasons for it, of course, are the combination, the deadly combination, of their minority status the racial polarized voting in use of racial campaign literature, and it all adds up to mean they know they are not going to have a chance to run as a black candidate in the county at large or the city at large. But I submit that if your Honor was going to read the Gadsden County case to say that the presence of the -- of an open Democratic primary in the case of a county commission or school board, or in the case of non-partisan election in the case of the City Commission forecloses the question then that factor is foreclosed. I don't think you will read Gadsden County that way and will instead consider the actual circumstances.

The second factor, primary factor in zimmer, is non-responsiveness. Once again, the Plaintiffs did not attempt, because we simply could not attempt, to prove in each and every respect racial discrimination in the delivery of the wide variety of services by these three governmental bodies. If we had done that, we could have obtained reflief under several other federal statutes governing not only employment, but municipal services and so forth. What we did establish -- first of all, let's talk about the school board. The

contrary.

All right. Add to the context -- add to the factor of racially polarized voting the use of racial campaign techniques the clear awareness of the politicians of the effect of this polarized vote on their chances to win and you come up with your result that we now have in Mobile County which is a net zero.

THE COURT:

Aren't you asking me to use polarization of vote to enhance two of the factors, both slating an historical discrimination?

MR. BLACKSHER:

Yes, I am.

THE COURT:

Bootstrapping?

MR. BLACKSHER:

Yes, sir. Well, you might characterize it that way but it was done by the Court in the Shreveport case. And I think correctly --

THE COURT:

It was the District Court?

MR. BLACKSHER:

Yes, sir. The whole thing adds up to an unlawful delusion of the black vote. And delusion --

THE COURT:

Let me ask you what is your concept of Zimmer on this question of tenuous state policy that if there is a tenuous state policy for at large as opposed to single member districts as being indicative of discrimination or if there is not a tenuous state policy, what is your concept of just what Zimmer means?

MR. BLACKSHER:

I really don't understand your question, your Honor.

THE COURT:

Well, there are four factors you should consider.

MR. BLACKSHER:

Yes, sir.

THE COURT:

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Yes, sir. I agree with you. And we know that blacks want to have more black representatives on this board. That is part of the empitus for this law suit. We certainly don't deny that.

But in seeking that we, in no way, have to compromise the fundemental constitutional principles or rights that we are asserting just for an even chance.

THE COURT:

All right. I believe you are next, Mr. Philips.

MR. PHILIPS:

May it please the Court, it is the position of my client that the blacks do not have a constitutional or legal right to a politically safe black electoral district wherein they can be assured of election. On cross examination, Dr. Cottrell, the Plaintiffs' expert witness, testified that this would not be constitutionally sound.

In Wallace versus House, the Fifth Circuit Court of Appeals said this, quoting from Chavis and Register, it said this: "Chavis and Register holds explicit simply that no racial or political group has a constitutional right to be represented in the Legislature in proportion to its numbers. So, it follows that no such group is constitutionally entitled to an apportionment structure designed to maximize its political advantages. Neither does either voter or group of voters have a constitutional right to be included within an electoral distric

that is especially favorable to the interest of one's own group or to be excluded from a district that is dominated by some other group".

Now, in Nevitt versus Sides, in reversing the District Court, the Court of Appeals said this: The trial court findings may be read as indicating that elections must be, somehow, so arranged, at any rate, where there is racial block voting, that black voters elect at least some candidates of their choice regardless of their percentage turnout. This is not what the Constitution requires."

Now, it is also the position of my clients that the mere showing of adverse impact is not sufficient to warrant disruption of an established governmental system. Again, in Wallace versus House, the Court of Appeals said: "The critical question under Chavis and Register is not whether the challenged political system has a demonstrably adverse effect on the political fortunes of a particular group or whether the effect is invidiously discriminatory." Now, it is also the positionof my clients that under Washington versus Davis the court indicated that before a court can declare a statute unconstitutional, by reason of its being racially discriminatory, the statute must first have been proved to have been racially discriminatory purpose upon its enactment, and I will not go into -- extensively, into Washington v. Davis, because I think the court .....

THE COURT:

Do you want to add anything to my questions to Mr. Arendall, if the Court intended for that decision to have the far reaching impact, through the structure of constitutional law, on multi-member districts on the school desegregation cases and all. It seems to me singular that they did not so express.

They did, I believe, expressly overrule one case in that. I may be in error. They didn't mention these other cases.

MR. PHILIPS:

Yes, sir. I cannot gain say what Mr. Arendall has already said on this point. It would be simply duplication. So, there is no point in me going further with that.

The Plaintiffs have failed not only to meet, however, assuming that Washington v. Davis may be applicable. The Plaintiffs have failed, not only to meet the burden of proving that the statute creating the School Board was enacted for discriminatory purposes, but from the testimony of the Plaintiffs own witnesses, they have affirmatively proven that it was not enacted for discriminatory purpose.

Now, on January 10th, 1826, the Alabama Legislature first approved legislation providing for the establishment and maintenance of public schools in Mobile County. This was the first provision for a public school system in the State of Alabama.

This Act is found in Acts of Alabama, 1825, 1826, page 35. This Act provided for commissioners to be elected from the County at large.

Now, in 1836, by further Act of the Legislature, the number of commissioners was changed, but this Act continued to provide for the election of Commissioners by general election from the County at large.

In 1854, twenty-eight years after establishment of a public school system for Mobile County, the Legislature of the State of Alabama passed the necessary legislation to set up the first public school system for the remainder of the State. I have the citations, Your Honor, to all of these Acts, in my trial memorandum. So, I won't burden the Court with the citations, as I go along.

The prior existence, by some twenty-eight years, of the school system -- the separate school system -- in Mobile County under the governants of the Board of School Commissioners of Mobile County was recognized in that Act. In 1857 the settled policy of taking Mobile County out from under the general scheme of public school legislation was written into the Constitution of Alabama, in 1875, Section 11 of Article 12.

Now, on February 15th, 1976, the Legislature passed an Act establishing the number of Commissioners at nine, but continuing to provide for their election, at large, on a county wide basis. Upon adoption of a new Constitution in 1901, the

settled policy of taking Mobile out from under the general scheme of public school legislation and recognizing its existence as a separate school system was written into the Constitution of 1901 at Section 270 of Article 14, which Your Honor has there. That has been amended on one occasion. It is amendment 111, I believe. I forget the date of the amendment. Amendment 111 removes all reference to racial separation in the schools.

THE COURT:

Let me ask you a question.

MR. PHILIPS:

Yes, sir.

THE COURT:

Does that not indicate to you some racial intent there?

MR. PHILIPS:

Some racial intent?

THE COURT:

Yes, sir, that separate schools for each race shall be maintained by the school authorities?

MR. PHILIPS:

Your Honor, I don't know what was in the minds of the framers .....

THE COURT:

I am telling you what the reading of the Constitution says.

MR. PHILIPS:

Well, the reading of the constitution means to each person what he reads into it or out of it. Now, what I was going .....

THE COURT:

I am asking you what you read in it?

MR. PHILIPS:

No, sir, I have not. I do not, simply because I have read the cases where the Supreme Court of Alabama has been faced with the need to interpret that statute and has interpreted separate thoughts and separate aspects of the statute. So, I don't read that into it at all, from the standpoint of the manner in which it created separate and apart and set up the manner of election of the members of the school board and the manner of the existence of the school board.

THE COURT:

It said, provided they maintain separate races.

MR. PHILIPS:

Well, this had simply to do with the maintenance of schools for separate races.

THE COURT:

It established at large systems provided they maintained separate races.

MR. PHILIPS:

Yes, sir. I realize that the proviso is there. I cite Your Honor to the cases where those separate provisions of that

particular Constitutional provision have been interpreted by the court.

Now, August, 1919, the Legislature passed an Act again making some changes in the structure of the board, but continuing to provide for a board composed of five members elected by the voters of the county, at large, for staggered six year terms with elections every two years. This is the statute or the Act under which the board exists in its present form, at this time.

Now, I notice from the proposed findings of fact, first off, and then again, it became an evidentuary matter late in the course of the trial this morning, that they, the Plaintiffs, apparently, do not accept this to be the case, and they cite two subsequent Acts of the Legislature as having changed that.

First, Act number 113, passed April 4th, 1933, and Act number 498, September 21, 1939. The Plaintiffs are simply incorrect in their position on this.

Act number 498, the latter of the two, is not a local Act applicable to Mobile County, but is a general Act with local application and then it is therefore inapplicable to Mobile County by virtue of the provisions of Section 270 of the Alabama Constitution as the Supreme Court has repeatedly construed Section 270 and the effect of 270 in shielding out general Acts of the Legislature and general Acts of local application, and the Mobile County School Board can only be, according to the

Supreme Court, be affected by local Acts.

Now, Act number 113, the second of the two, passed on April 4th, 1933.....

THE COURT:

So, if that is true an Act passed as a general Act would require no advertising and would be unconstitutional?

MR. PHILIPS:

I think it would.

THE COURT:

So, the proposed Act this last time was, therefore, unconstitutional?

MR. PHILIPS:

I think it was.

THE COURT:

Okay.

MR. PHILIPS:

There never has been any doubt in my mind about that.

THE COURT:

The fact that it was passed would have been another thing.

MR. PHILIPS:

I think it would.

THE COURT:

Okay.

MR. PHILIPS:

Act number 113, which is the second of the two Acts that they cite as having superceded the original -- the Act in 1919, was declared void by the Supreme Court of Alabama on June 29th, 1933, two months after its enactment, in the case of Exrel: Northquist versus Glennon. I have a copy of the decision that I will hand to the Court.

THE COURT:

Did the School Board take any action with reference to the 1976 Act to have it corrected to a local bill?

MR. PHILIPS:

Did it?

THE COURT:

Yes, sir.

MR. PHILIPS:

They were in the process of doing so when the session ran out, Your Honor.

THE COURT:

That was after our conference in July when I called it to your attention, if you wanted the Court to let the Legislature do something, that the Legislature was then in session.

MR. PHILIPS:

I believe so, Your Honor. I think that is true.

THE COURT:

All right.

MR. PHILIPS:

So, the original act, creating the School Board, was passed in 1826. And the Act under which it presently exists was passed in 1919.

Now, according to the testimony, neither Act was nor could have been enacted with the purpose in mind to discriminate against blacks because at the time both were enacted, blacks were not a part of the political process in Alabama. but in the words of Dr. McLaurin they were a political non-entity.

THE COURT:

It was still governed by Section 270. The Acts do not do away with 270.

MR. PHILIPS:

Certainly not. It is also these Defendants' position that under White versus Register, the Plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election are not equally open to the participation by the group in question.

Now, clearly all of the testimony has indicated that every aspect of the political process, registering to vote, voting, qualifying to run for office, running for office, are all equally open to blacks and to whites on the same basis in Mobile County.

Finally, Your Honor, it is the School Board's position that if the Plaintiffs are able to meet the demands and we submit that they have not, but if they are able to meet the

PLAINTIFFS EXH 2

Mobile Blacks and World War II: The Development of a Political Consciousness

MELTON A. MCLAURIN

Emancipation excepted nothing had so profound an impact upon the South's black community as the Second World War. War industries lured blacks by the thousands into the region's urban areas. The war provided for many their first opportunity to escape the vise of rural poverty. For those blacks already in urban areas, the war created unparalled economic opportunities. Increased mobility and earning power prompted a desire for more social freedoms and encouraged the hope of acceptance within the mainstream of the nation's economic and political life. The ideological clash between the Allies and the totalitarian powers, emphasized by the Nazis' treatment of the Jews, awakened hope that the United States would finally subdue the forces of prejudice and discrimination within its own borders. Thousands of black service men returned from the war determined that their nation recognize fully their rights as citizens. Throughout the black community the war wrought social and economic changes, aroused aspirations of a better life, and stiffened the determination of a people to demand the equality, dignity, and freedom which were their due. The impact of the war launched the modern civil rights movement and sounded the death knell of "The South."

Mobile, Alabama, uniquely exemplified the impact of World War II on the South's black community. Nowhere in the country did the war more disrupt established patterns of race relations. A cotton and lumber port and a paper mill town, Mobile had "slept for 230 years, then woke up in two." The city's 1940 population of 78,720 zoomed to an estimated 125,000 by 1943, as blacks and whites streamed into Mobile

from the rural areas of Alabama, Mississippi, and west Florida.[1] The city's black population rose from 29,046 in 1940 to 45,819 in 1950, nearly all of the increase occuring in the war years.[2] Blacks obtained employment at the city's two major ship yards, the docks, other war related industries, and Brookley Air Base. Crowded into two major areas, one to the north and one south of the downtown area, the grow-[47/48]ing black community presented the staid port city with a major social problem. The ingrained prejudices of the rural whites who composed the remainder of the city's new inhabitants made the racial situation even more volatile.

Mobile was also unique in that three of its citizens achieved statewide prominence in Alabama's post war effort to cope with changing patterns of race relations. Each man's reaction was, in large measure, influenced by the impact of war on Mobile's old racial patterns. John L. LeFlore, postal clerk and executive secretary of the local chapter of the National Association for the Advancement of Colored People (NAACP), represented the growing restiveness of the black community. He helped found the chapter in 1925, and devoted much of his time to its efforts. Outspoken and energetic, LeFlore became the black community's leading spokesman, achieving state and national recognition for his efforts.[3] Champion of the old racial order was attorney Gessner McCorvey. A representative of Mobile's white power structure, McCorvey was a formidable state political figure, as well. As chairman of the State Democratic Executive Committee, he supported the state's conservatives on both racial and economic issues.[4] Joseph N. Langan completed this unusual trio. A member of a prominent Mobile family, and a devout Catholic, the young attorney rose to the rank of colonel while serving in the Pacific. Capable and ambitious, he returned from the war to enter Mobile politics, winning the county's only state senate seat in 1946. In the senate he supported the Folsom administration and the policies of the

national Democratic Party.[5] From 1944 through 1949 these three men were repeatedly involved in the racial politics of their city and state.

As executive secretary of the local NAACP, LeFlore devoted his energies during the war years to opening economic opportunities for blacks. He turned to federal agencies to pressure war contractors to employ blacks. He badgered the War Manpower Commission and Sidney Hillman of the National Defense Advisory Commission about the lack of industrial training facilities for blacks until a welding school for blacks was established in Mobile.[6] He then prodded the Fair Employment Practices Commission to see that black welders were hired on an equal basis with whites by the shipyards. Whites at the Alabama Dry Docks and Shipbuilding Company rioted for two days in May, 1943, because the FEPC had persuaded the company to upgrade twelve [48/49] black welders.[7] LeFlore also urged the commander of Brookley Field to increase training and employment opportunities for blacks and sought the appointment of black physicians as examiners on local selective service boards.[8]

The improvement of public accommodations for blacks absorbed the rest of LeFlore's attention during the war. He requested equal accommodations from several railroads and both local and national bus lines. He asked local department stores to install lunch counters, restrooms, and water fountains for blacks. Invariably, LeFlore adopted a conciliatory approach in his correspondence, imploring management to recognize the rights of blacks as American citizens. He offered the promise of increased black patronage should management heed the complaints of the black community.[9]

Throughout the war years LeFlore's activities were supported by an active NAACP chapter. The local kept in close contact with such national leaders as Thurgood Marshall, Clarence Mitchell, and Charles Houston.[10] LeFlore's efforts

demonstrated that Mobile's black community both desired and was willing to initiate change. They also developed contacts with federal agencies capable of enforcing racial policies bitterly resented by white Mobilians. Thus a war-time economy, a somewhat sympathetic national administration, and the limited, but nevertheless real, achievements of the local NAACP combined to create a sense of hope, even expectation, within Mobile's black community.

Until 1944 LeFlore and the NAACP concentrated their efforts in the areas of employment opportunities and public accommodations, virtually ignoring political rights. Alabama's white Democratic primary compelled this choice by effectively removing blacks from the state's political arena. But early in 1944 the Supreme Court, in *Smith* v. *Allwright,* ruled that white primaries were unconstitutional. The Mobile NAACP immediately laid plans to challenge Alabama's primary laws. Twelve highly qualified, registered blacks were picked to attempt to vote in the May 3 Democratic primary. LeFlore arranged to publicize the confrontation between black voters and Mobile election officials. As correspondent for both the *Chicago Defender* and the *Pittsburgh Courier,* he had good press contacts. Photographers from *Time* and *Life* arrived in Mobile and conferred with NAACP leaders and the twelve prospective voters. When the blacks appeared at the polls, so did the photographers. The poll inspectors refused [**49/50**] to allow the blacks to vote as the cameras clicked. The rebuffed blacks left without incident. *Life* carried the story with pictures the next week. [11]

Upon the advice of Thurgood Marshall, the Mobile blacks sought advice from the Department of Justice. Each of the twelve filed with the department an affidavit giving a detailed account of the denial of their voting rights. Francis Biddle, then attorney general, assured the local NAACP that the Department of Justice would take legal action to force Alabama to

comply with the *Smith* v. *Allwright* decision. But the Justice Department failed to take such action, a failure attributed by LeFlore to President Roosevelt's death and Truman's replacement of Biddle with Tom Clark, a Texan. Clark allowed the Alabama Democratic party time to voluntarily comply rather than taking it to court.[12] It took the party a year-and-a-half to do so.

Yet the import of *Smith* v. *Allwright* and the twelve affidavits of the Mobile blacks was clear: Alabama had to abandon the white primary. For Gessner McCorvey the problem lay in how to do so, yet continue to disfranchise blacks. To accomplish this, McCorvey proposed that local registrars be given sweeping discretionary powers. They should be empowered to refuse registration to anyone who could not "explain and understand" the federal constitution. The legislature adopted McCorvey's proposal in the form of a constitutional amendment, called the Boswell amendment, in the fall of 1945 just as the war drew to a close. To be adopted, the amendment had to obtain voter approval in the general election of November 7, 1946.[13]

Meanwhile, acting under pressure from the Department of Justice, the State Democratic Executive Committee met on January 12, 1946, and opened the party's primary to all "qualified voters." McCorvey expressed confidence that the Negro vote was so small that it "would not cut any ice." As for the threat of increased black registration, McCorvey declared that the proposed amendment "covers the situation admirably."[14]

McCorvey was correct. In January, 1946, his native Mobile County contained 275 registered black and 19,000 white voters. Local registrars could still use the literacy test and a cumulative poll tax to bar blacks from registering. Despite such barriers, Mobile blacks sought to take advantage of the demise of the white primary. Blacks in increasing numbers, their ranks swelled by returning veterans, sought to register.

Thirty blacks, including [50/51] several veterans, sought to register in Mobile two days after the meeting of the Democratic Executive Committee.[15] To stall black registration the local board chaired by Milton Schnell, adopted an informal quota system. No matter how many blacks applied, only a few were registered at each of the board's somewhat infrequent sessions. The NAACP countered the board's action by taking affidavits from blacks denied the chance to register and forwarding them to the Department of Justice. Again, local blacks received little aid from the department.[16]

The board's stalling tactics worked well. By May only 691 blacks were registered in Mobile county. Yet Mobile blacks for the first time voted in a Democratic primary on May 7, 1946. The voter turnout was light. The *Mobile Register* noted that fewer blacks voted than had been anticipated. No racial incidents occurred at the polls. In the voting Joe Langan won election to the county's only state senate seat.[17]

After the primary, black voter registration efforts increased. Returning veterans formed the Negro Voters and Veterans Association, with J. J. Thomas as president. Together with the NAACP, the Veterans Association stressed voter registration. By the end of 1946, Mobile County's black voters had doubled in number, totaling over 1,300.[18]

The continued growth of the black electorate alarmed McCorvey, who was determined to see the Boswell amendment adopted. In appealing to the State Democratic Executive Committee for funds with which to mount a campaign for the amendment, McCorvey told the committee that it was "entirely proper" for it to "lead the fight to maintain the traditions of your party in this State by adopting the proposed amendment to our constitution and endeavoring, as far as it can legally be done, to make the Democratic Party in Alabama the 'White Man's Party.' " The committee agreed and appropriated $3,500

for a pro-amendment campaign. In the 1946 November general election, Alabama's voters overwhelmingly endorsed the Boswell amendment.[19]

The Boswell amendment proved as effective a deterrent to the registration of blacks as McCorvey predicted. From October, 1947, until March, 1948, the local board registered only 39 blacks. By the end of 1948, it had registered 2,800 whites and 104 blacks, most of whom were school teachers.[20]

The Boswell amendment failed, however, to halt the development of a black political consciousness. New black veterans or-[51/52]ganizations continued to appear as older organizations increased their membership. The Negro Voters and Veterans Association claimed over eight hundred members. By the fall of 1947, Mobile's black veterans had organized chapters of the Disabled Veterans of America, the American Legion, and the Veterans of Foreign Wars. Joe Langan, a national vice-commander of the VFW, helped organize the black chapter and encouraged its members to work for the franchise and educational opportunities.[21]

In the summer of 1947, Mobile blacks sought the aid of the county legislative delegation in improving educational opportunities in their community. Overcrowded and under financed, the Mobile school system was seeking legislative relief. In August, Mobile citizens approved a two-cent tax on beer as a source of additional school funds. The tax lacked only legislative approval to become effective. At this juncture, the NAACP, under LeFlore's leadership, attended a public meeting the legislative delegation held to air Mobile's educational problems. LeFlore presented the delegation with a seven-point program which called for equal education opportunities at both secondary and college levels, the equalization of salaries paid to black and white teachers, and a reduction of pupil loads for black teachers. LeFlore and others explained to the delegation that black teachers frequently taught twice the student load assigned to their white colleagues for little more than half the pay.[22]

Langan shocked all parties concerned by supporting the NAACP requests. War time service with blacks had shaken his racial prejudices, forcing him to "really look at some basic principles of life and . . . the fact that we are all creatures of God." Combined with his Christian beliefs, this examination convinced him that "I could not consider any person to be less entitled to anything in life than I was." [23] Acting on these convictions, Langan refused to support the proposed tax unless the school board agreed to equalize teacher salaries and adjust student-teacher ratios. The state senate's practice of rejecting local bills lacking approval of the local senator compelled the school board to agree to Langan's terms. While the bill passed the house, Langan and the board negotiated an agreement. On September 16 the bill passed the senate with Langan's approval, and Mobile blacks scored a remarkable victory. [24]

Continued black political activity, however, was impossible [52/53] unless the Boswell amendment was overturned. Realizing this, both the NAACP and the Negro Veterans Association laid plans to challenge the amendment in federal court. The threat of a Dixicrat rebellion in the upcoming presidential election provided an incentive for both groups. The Veterans Association moved first. On March 1, 1948, Hunter Davis and nine other Mobile blacks filed suit against the local board of registrars in an effort to have the Boswell amendment declared unconstitutional. [25]

In November, a three-judge circuit court heard the case of *Davis* v. *Schnell.* The plaintiffs contended that the board of registrars used the amendment to deny them rights to register solely because they were Negroes. Two members of the board denied this charge. The third, E. J. Gonzales, a Langan political ally, testified that he "could not join all of the denials" contained in the board's defense. The court noted McCorvey's motives for proposing the amendment, the miniscule number of blacks registered since its adoption, and the vagueness of the

amendment's "understand and explain" clause. The court ruled the Boswell amendment gave local boards arbitrary powers to discriminate against any group of electors, and was therefore unconstitutional. [26]

With the impediment of the Boswell amendment removed, Mobile blacks rushed to register. Both the NAACP and the Veterans Association expanded their voter registration programs. Blacks in groups of two hundred to three hundred persons descended upon the local board. An alarmed Gessner McCorvey wrote a friend in January, 1949, that recently sixty-eight Mobile Negroes had registered in one day.[27] Having failed to defeat President Truman in 1948, Alabama Dixiecrats now faced the possibility that black voters would contribute to their defeat within the state party. To prevent that possibility from occuring, McCorvey again proposed a means of disfranchising blacks. He presented the legislature with a revised form of the Boswell amendment which he believed could withstand inspection by the federal courts. Again, the key to McCorvey's proposal was a sweeping grant of power to local registrars. Local boards could refuse to register anyone "unless he be of good character and understands and embraces the duties and obligations of citizenship under our form of government." These requirements, argued [53/54] McCorvey, approximated federal requirements for naturalization.[28]

Meanwhile, the September, 1949 municipal elections provided an incentive which prompted Mobile blacks to register in record numbers. On August 15, the board registered 226 new voters, 116 of whom were black. Board member Gonzales worked overtime for two hours to see that all who stood in line when the board closed were registered. On September 6 over 100 more blacks registered.[29]

Faced with a growing black electorate and a national administration committed to a strong civil rights program, McCorvey and other Dixiecrats were determined to see the

revised Boswell admendment adopted by the 1949 legislature. Although the Folsom administration opposed the amendment, it passed the house. The senate supported the amendment overwhelmingly, but here a filibuster could defeat it. Proponents of the amendment made it clear that a filibuster would also kill any chance of state reapportionment, which was highly desired by Folsom supporters. Joe Langan proposed a compromise requesting that all veterans, white and black, be exempted from the provisions of the proposed amendment. Proponents of the amendment refused to compromise, thus forcing the opponents to accept the amendment or resort to the filibuster and kill all hope of reapportionment. Four senators, including Joe Langan of Mobile, chose the latter. [30]

The filibuster began at 1:00 P.M. September 8. On the senate floor Langan argued that God had not created a super race. The senate, he charged, was "desecrating the soul of Alabama by trying to take away the birthright of some of its citizens. . . .Thank God we still have the Federal Supreme Court." For twenty-three hours Langan and three up-state colleagues held the floor. At midnight, September 9, the last legally authorized legislative day of the 1949 session ended. The revised Boswell amendment had been defeated.[31]

On September 10, the Negro Voters and Veterans Association expressed its gratitude to the four senators who staged the filibuster. President J. J. Thomas revealed that the organization planned to continue its registration program, and cited the growth of the Association in Birmingham, Montgomery, and Tuskegee. When Mobile held its municipal elections on September 12, blacks voted in record numbers in a peaceful election that saw only one minor racial incident.[32] But the fight over the [54/55] amendment was not without repercussions. In the 1951 Democratic primary attorney Tom Johnson, using the race issue, defeated Joe Langan in his bid for re-election to the state senate.[33]

Compared with the recent racial revolution, the struggles of the 1940s seem tame indeed. But the achievements of that decade were essential and without them, the modern civil rights movement never would have occurred. A war time economy and the rhetoric of a democracy at war, sparked within the Mobile black community a hope for a better life. Returning black veterans demanded the rights their service had helped secure. Their presence lent determination and moral force to the reform efforts of such organizations as the NAACP and the Negro Voters and Veterans Association. Mobile blacks emerged from the war resolved to enter community politics and to utilize community politics to improve their economic and social life. John LeFlore, and to a lesser extent, J. J. Thomas, provided the leadership required to realize that goal.

But without support from the white community, the black struggle would have been considerably more difficult. That support came from the leadership of Joe Langan, who, like the black veteran, had seen his beliefs, values and aspirations changed by the experience of war.

1. Selden Menefee. *Assignment: U.S.A.* (New York, 1943), p. 51.
2. Bureau of the Census, *1940 Census: Population*, vol. 2, part 1, p. 317; Bureau of the Census, *1950 Census: Population*, vol. 2, part 2, p. 2-54.
3. Interview with John L. LeFlore, Non-Partisan Voter's League, Mobile, Alabama, July 3, 1970.
4. William D. Barnard, "Southern Liberalism in Triumph and Frustration: Alabama Politics, 1946-1950" (Ph.D. dissertation, University of Virginia, 1971), pp. 143, 219 (hereinafter cited as Barnard, "Southern Liberalism").
5. Interview with Joseph N. Langan, Mobile attorney, Mobile, Alabama, October 12, 1972.
6. LeFlore to Sidney Hillman, November 11, 1940, Mobile NAACP Papers, Library, University of South Alabama, Mobile, Ala. (hereinafter cited as NAACP Papers). Interview with John LeFlore, August 7, 1970).
7. *Mobile Register*, May 26-29, 1943; Thurgood Marshall to LeFlore, May 26, 1943, NAACP Papers; also see Boyte A. Presnell, "The Impact of World War II on Race Relations in Mobile, Alabama, 1940-1948" (M.A. thesis, Atlanta University 1972), pp. 8-20 (hereinafter cited as Presnell, "The Impact of World War II").
8. LeFlore to Col. V. B. Dixon, Commander of Brookley Field, October 17, 1942, and LeFlore to Dr. B. F. Austin, February 13, 1941, NAACP Papers.

[55/56]

9. Presnell, "Impact of World War II," pp. 8-21. See also LeFlore to R. K. McClain, July 24, 1940; LeFlore to C. E. Bell, July 23, 1940; LeFlore to [55/56] H. V. Greenslit, October 29, 1940; and LeFlore to S. H. Kress Company, November 7, 1940, all in the NAACP Papers.
10. Interview with John L. LeFlore, August 7, 1970. Also see LeFlore to Charles Houston, May 25, 1940; LeFlore to Walter White, May 20, 1940; LeFlore to Thurgood Marshall, June 15, 1944; as examples of correspondence to national NAACP leaders. All letters found in the NAACP Papers.
11. Interview John L. LeFlore, October 9, 1972; "Voting in the South," *Life* 16 (May 15, 1960; 32-42)
12. Affidavits of E. J. Tavion, Clifton T. McKinnis, Raphael Taylor, May 9, 1944, NAACP Papers: LeFlore Interview, October 9, 1972.
13. For a thorough discussion of the origins of the Boswell amendment, see Barnard "Southern Liberalism," Chapter 4. Also see Presnell "Impact of World War II," pp. 24-27.
14. *Mobile Register*, January 2, 13, 1946.
15. Ibid., January 15, 1946; LeFlore Interview, October 9, 1972.
16. Affidavits of Jesse Pinkney, Robert Bell, James Dial, May 9, 1946, NAACP Papers; LeFlore Interview, October 9, 1972.
17. *Mobile Register*, May 8, 1946.
18. *Mobile Press*, January 19, February 1, 1947.
19. Davis v. Schnell, 81 F.Supp., 872-81; *Mobile Register*, November 8, 1946.
20. Davis v. Schnell, 81 F.Supp., 872-81.
21. *Mobile Press*, February 1, September 14, 1947; Langan Interview.
22. LeFlore Interview, October 9, 1972.
23. Langan Interview.
24. Ibid.; LeFlore Interview, October 9, 1972; *Mobile Register*, September 17, 1947.
25. Davis v. Schnell, 81 F.Supp., 872-81; *Mobile Register*, March 2, 1948; LeFlore Interview, October 9, 1972.
26. Davis v. Schnell, 81 F.Supp., 872-81.
27. LeFlore Interview, August 7, 1970, and October 9, 1972; Barnard, "Southern Liberalism," p. 206.
28. *Mobile Register*, May 12, 1949.
29. Ibid., August 16, September 7, 1949.
30. *Mobile Press*, September 10, 1949; Barnard, "Southern Liberalism," pp. 283-290.
31. *Mobile Press*, September 10, 1949; Langan Interview.
32. *Mobile Press*, September 11, 13, 1949.
33. Ibid., May 2, 1951; LeFlore Interview, October 9, 1972; Langan Interview.

Plaintiffs Exhibit 4

VOTER TURNOUT

COMPARISON FOR SELECTED ELECTIONS AND WARDS

PREDOMINATELY BLACK WARDS

WARDS	% BLACK V A P	REGISTERED VOTERS MAY, 1976	County Comm. Place #1 May, 1976	County Comm. Pl.#1 Runoff May, 1976	School Board Gill-Alexander 1974 Runoff
33-99-1	91%	3584	1783	1806	1755
33-99-2	95.4%	3149	898	898	877
33-99-3	90.6%	1808	506	320	537
**33-99-4	95.7%	1712	457	434	428
*35-103-1	99.5%	2784	634	462	606
Totals		15,037	4,278	4,120	4,303
Turnout			28.4%	27.3%	28.6%
* For 35-103-1 Only			22.7%	16.5%	
** Sub-total House 99 Only		12,253	3,644	3,658	
Turnout House 99 Only			29.7%	29.8%	

PREDOMINATELY WHITE WARDS

34-100-4	.6%	4431	1272	1106	1436
34-101-1	.7%	3807	1110	897	1225
34-101-2	2.6%	4177	1322	1229	1365
34-101-3	.4%	4141	1361	1246	1294
34-102-3	1.0%	2831	939	893	1103
34-102-4	.3%	2052	698	691	845
34-102-5	.0%	4460	1505	1364	1710
35-103-4	2.6%	3769	911	748	1043
35-104-4	.8%	3330	913	787	1111
35-104-5	2.0	3127	1034	985	810
Totals		36,125	11,065	9,946	11,942
Turnout			30.6%	27.3%	33.05%

Plaintiffs Exhibit 5

VOTER REGISTRATION
MOBILE - 1973

PREDOMINATELY BLACK WARDS

WARD	% BLACK V A P	V A P	REGISTERED VOTERS AS OF JULY 9, 1973
1	95.3%	1878	963
2	95.2%	4639	2876
3	95.9%	6679	4358
10	99.5%	6285	4192
20	96.0%	1817	1251
22	94.7%	1771	1152
32	99.9%	2883	1478
Totals 7 Black Wards		2,5952 % Black Registered Voters 63.4%	16,470

PREDOMINATELY WHITE WARDS

4	.2%	2742	2720
6	2.1%	5685	5035
15	2.1%	3893	3324
16	.09%	2167	2077
17	.00%	4846	4465
18	2.1%	6342	6363
35	.4%	2915	2336
36	.08%	5362	3140
37	.6%	4058	3140
Totals 9 White Wards		38,010 % White Registered Voters 89.6%	34,086

AN ANALYSIS OF VOTING PATTERNS IN

MOBILE, ALABAMA, 1948-1970

DISSERTATION

Presented to the Graduate Council of the

North Texas State University in Partial

Fulfillment of the Requirements

For the Degree of

DOCTOR OF PHILOSOPHY

By

James Everett Voyles, B. S., M. A.

Denton, Texas

May, 1973

CHAPTER I

INTRODUCTION

For many years following the War Between the States, the South was the most politically static region of the nation. Two inseparable themes predominated in Southern politics: the one-party system, and disfranchisement of the Negro. The past two decades, however, have seen far-reaching changes in the heretofore static politics of this region. Federal intervention in the process of registration and voting, culminating in the Voting Rights Act of 1965, helped to swell the ranks of Negro voters in the South. During this same time period, the Republican party enjoyed phenomenal growth in many Southern states.

There have been differences of opinion relative to the role of the Negro voter in the South. Three major schools of thought developed. The first, as represented by Alexander Heard, expressed speculative optimism concerning the impact Negroes would have on Southern politics should they be allowed to vote in large numbers. This same cautious optimism is evident in the work of V. O. Key.

His classic work, Southern Politics,[1] still stands as the most definitive study of the South as a political region. Using aggregate vote data collected county by county, Key constructed a state-by-state description of Southern politics. His basic observation was that the South was a one-party conservative area due to the lack of Negro voters and the general low interest shown in political matters by the population as a whole. He wrote,

> Southern sectionalism and the special character of southern political institutions has to be attributed in the main to the Negro. The one-party system, suffrage restrictions departing from democratic norms, low levels of voting and of political interest, and all the consequences of these political arrangements and practices must be traced ultimately to this one factor. All of which amounts to saying that the predominant consideration of the architecture of southern political institutions has been to assure locally a subordination of the Negro population and, externally, to block threatened interference from the outside with these local arrangements.[2]

The absence of the Negro vote, coupled with the low turnout by the lower-income whites, produced an upper-class bias to Southern politics. Heard notes that, "the absence

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[1] V. O. Key, Southern Politics (New York, 1949).

[2] Ibid., p. 665.

from the electorate of huge amounts of Negroes weighs the electorate in favor of the 'haves.' Politicians would feel more need to cultivate lower-income groups if more of them voted."[3] Key forecast that "if the blue-collar vote in the South should double, southern conservatives in Congress would probably become less numerous."[4]

A second school of thought evolved out of the concern for Negro rights originating in the civil rights movement of the 1960's. This school was characterized by studies dealing with Negro political attitudes and the effects these attitudes would have on black voting patterns once Negroes were allowed to vote in large numbers. Adopting the basic tenets of Beard and Key that Southern politics would become more progressive when blacks received the vote, the writers in the 1960's became interested in factors relating to Negro registration and began to predict the end of Southern conservatism when white domination was terminated.

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[3]Alexander Heard, A Two Party South? (Chapel Hill, N.C., 1952) pp. 12-13.

[4]Key, op. cit., p. 105.

In 1962, Charles Steinberg traced the history of Negro voting from Reconstruction to the 1960 Civil Rights Act.[5] He found that, despite the Fourteenth and Fifteenth Amendments, the Negro was faced with obstacles: economic reprisals, literacy tests, "grandfather clauses." Court suits seemed of no avail; not only was the process long and expensive, but as soon as one method of Negro disfranchisement was struck down, another was developed. The fulfillment of the law depended too much on the integrity of the local officials by whom it was administered. Therefore, Steinberg felt that the real hope of Negroes was that they would one day have sufficient political influence to bring about the passage of strong federal legislation containing a clear executive mandate to guarantee the spirit and letter of the Fourteenth and Fifteenth Amendments.

Steinberg described the Civil Rights Act of 1957,[6] blaming its ineffectiveness upon the lack of enforcement machinery. He saw the 1960 Civil Rights Act[7] as a step in the right direction, although it was limited in usefulness.

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[5]Charles Steinberg, "The Southern Negro's Right to Vote," The American Federationist, LXIX (July, 1962), 1-6.

[6]U.S. Statutes at Large, LXXI, 634 (1957).

[7]U.S. Statutes at Large, LXXVII, 412 (1960).

Steinberg believed that the emancipation of the Negro voters could help reshape and liberalize our political structure, making new developments possible for the entire nation. To accomplish this emancipation, he found a need for: a massive educational program on the right to vote, increased staff and budget for the Attorney General, and stricter penalties for violations of a citizen's voting rights.

Joseph Brittain also made an historical study of Negro suffrage.[8] He focused his attention on the various impediments devised to disfranchise the Negro in Alabama, concentrating on the theme that, whenever one device was struck down, another was created to keep the blacks from political effectiveness. The white primary was followed by the Boswell Amendment, which was in turn succeeded by the Voter Qualification Amendment. When the poll tax was repealed, the gerrymander was revived. The Civil Rights Act of 1960 helped, but Brittain's work, written in 1962, noted that there was much left to be done.

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[8]Joseph M. Brittain, "Some Reflections on Negro Suffrage and Politics in Alabama--Past and Present," Journal of Negro History, XLVIII (April, 1962), 127-138.

Burke Marshall listed some measures used in the past to suppress registration of Negroes, from economic reprisals to poll taxes and white primaries.[9] He also described in some detail the remedies provided by the Civil Rights Acts of 1957 and 1960. It was Marshall's contention that Negro non-voting resulted almost exclusively from racial discrimination by officials.

Other students of Southern politics examined the process of political socialization in an effort to bring understanding. They found legal restrictions were only one part of the registration and voting process--attitudes were also important. Since race has always been a major political issue in the South, attitudes of whites toward Negroes, attitudes of Negroes themselves, and the relationship of class, race, and issues were important factors. One of the major socialization studies of white attitudes toward blacks in Alabama was developed by Schaffer and Schaffer.[10] Their statistical study classified individuals as either

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[9]Burke Marshall, "Federal Protection of Negro Voting Rights," Law and Contemporary Problems, XXVII (Summer, 1962), 453-467.

[10]Ruth C. Schaffer and Albert Schaffer, "Socialization and the Development of Attitudes Towards Negroes in Alabama," Phylon, XXVII (Fall, 1966), 274.

Johnnie Daniel, in 1966, investigated Negro political behavior and community political and socioeconomic structural factors.[18] This statistical study involved changes in the relationship between Negro political mobilization in 1960 and in 1966, as well as changes in the relationship between Negro political mobilization and the socioeconomic structure of Alabama communities from 1960 to 1966. He concluded that Alabama blacks are more involved in politics due to the 1960 Civil Rights Act and the Voting Rights Act of 1965.[19] Political mobilization of Negroes increased thirty percent or more in over half the counties in Alabama in the years studied; there tended to be more mobilization in counties with Negro candidates and in those with federal examiners. Thus, a social system with the opportunity to register for elections creates an atmosphere which results in blacks registering. Also, Negroes were more mobilized in areas where they were more likely to influence the elections, which led Daniel to

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[18] Johnnie Daniel, "Negro Political Behavior and Community Political and Socioeconomic Factors," Social Forces, XLVII (March, 1969), 274-286.

[19] U.S. Statutes at Large, LXXIX, 437 (1965).

conclude that black non-involvement in policies may be due largely to a feeling of non-effectiveness.

When he increases his political mobilization, the Negro also increases his socioeconomic status. Thus, Daniel found that, not only were blacks more mobilized in 1966 in Alabama than they had been since Reconstruction, but also their increased mobilization was accompanied by changes in their socioeconomic structures in their communities.

In 1970, Feagin and Hahn investigated black political strength in the South.[20] In this work, the authors noted that developments in Southern politics since the passage of federal civil rights legislation have required some revisions of earlier conclusions about black political activity in the South. Black voter registration has increased dramatically, especially since 1964. Since minority voters in the South have emerged in sufficient numbers to affect the outcome of major elections, the foundation has apparently been established for the use of

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[20] Joseph K. Feagin and Harlan Hahn, "The Second Reconstruction: Black Political Strength in the South," Social Science Quarterly, LI (June, 1970), 42-56.

The research done by authors in this second school of thought follows a common method. The legal restrictions barring the Negro from voting in the South are exposed for the purpose of suggesting changes to allow the Negro full participation in voting. Underlying this research is the belief that increased black participation in voting will mean increases in black political power. However, many of these works dealing with the role of the Negro as a voter in the South are speculative. Russell Middleton's suggestion that the party with the more militant position on civil rights issues would have the advantage has not been borne out in recent elections, most notably the 1968 and 1972 presidential elections, where candidates identified with social liberalism and civil rights were defeated. Feagin and Hahn's attempt to show black political gains by indicating the increased numbers of blacks holding political office in the South is only part of the story. They did not adequately explain that the increase they show in black office holders is primarily a result of returns from areas where blacks make up a majority of the voters.

In 1970, Numan V. Bartley began to question whether either school of thought represented the current reality.[22] It was Bartley's contention that, while the number of eligible Negro voters had certainly increased, and while Negroes had made some gains in electing members of their race to public office in the South, their entry into the political systems has had positive effects only in areas where they were in the majority. Bartley thus suggested a third school of thought on the Negro in contemporary Southern politics. He concluded that, in regions where whites retain the majority despite increased black registration, white reaction to Negro voting has nullified any political gains blacks might have enjoyed due to the increased number of black voters. Through the use of aggregate vote data, Bartley presented the thesis that Negro political power in Georgia has not increased since the advent of universal voting rights for blacks. He contended that the Georgia electorate has not become more progressive since the infusion of black voters into the political process, but rather has selected more conservative candidates than before.

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[22] Numan V. Bartley, From Thurmond to Wallace (Baltimore, 1972).

black belt counties. Already in several states of the marginal South, Negroes have won for themselves an accepted place within the Democratic party. This will help to push whites into the alternative party structure, the G.O.P., as soon as they realize the futility of third party movements. Second, white psychological dispositions to fight a hopeless rearguard action via a third party are shrinking in the face of the inevitable: they are not successful. Third, the National Democratic Party is becoming so alienated to the white Southerner as to underscore G.O.P. preferability. Fourth, the opinion-molding upper-middle class of the urban South is already tending toward Republicanism. Fifth, George Wallace notwithstanding, a new political cycle has begun which should render quite impractical the old Deep South strategy of seeking a balance of power in the Electoral College. Sixth, now that the G.O.P. is mobilizing enough white support to gain ascendency in Tennessee, North Carolina, and Florida, a social, cultural and political web of acceptability has been spun around the Republican party in the South.

The object of this study is to test the validity of two hypotheses suggested by the literature just reviewed.

The first is that black influence in electing candidates in Mobile has decreased since 1960, and the second is that the Republican party is emerging as the majority party in Mobile. The scope of the study is narrow, and in fact is an examination of a microcosm of Southern politics. The work will examine the role of the Negro voter and changing voter alignments in Mobile, Alabama, in an attempt to verify or reject the two hypotheses. Mobile is one of the most Southern cities, geographically, and has a reasonably large population (about 275,000 persons). Its Negro population makes up approximately 21 percent of the county and 30.5 percent of the city population; likewise, Mobile has seen the growth of a vigorous Republican party that now challenges the Democratic nominees in almost every election.

The research presented in this papor is a study of critical factors affecting the politics of Mobile since the early 1950's. This work involves the use of aggregate vote data from selected elections from 1948 to 1970. It is the intention of this paper to test the following hypotheses:

1. Black influence in electing candidates in Mobile has decreased since 1960.
2. The Republican party is emerging as the majority party in Mobile.

In order to examine these hypotheses, the relationship between voting patte ns and the variables of race and economic levels will be tested by the Pearson Product Moment Correlation. Product moment correlations are mathematical models that determine the degree of association between given variables. The coefficient of correlation between two candidates effectively reduces a scatter diagram comparing the votes won by each candidate to a number.[3] Although the Pearson coefficient varies from +1 to -1, it cannot be assumed that a coefficient of .50 means that the X

[3] Hayward R. Alker, Jr., Mathematics and Politics (New York, 1965), pp. 54-106.

variable accounts for half the variance in the Y variable. As an aid to the reader, a table of correlation is presented below; this indicates the relationship of X and Y at various r values:

An r of .90 accounts for 81 percent of the variance
An r of .80 accounts for 64 percent of the variance
An r of .70 accounts for 49 percent of the variance
An r of .60 accounts for 36 percent of the variance
An r of .50 accounts for 25 percent of the variance
An r of .40 accounts for 16 percent of the variance
An r of .30 accounts for 9 percent of the variance
An r of .20 accounts for 4 percent of the variance

Thus, correlations of less than .30 are not usually considered significant by most researchers. However, reflecting on the multiplicity of factors affecting human behavior, it is easy to understand that a single-factor explanation should not account for very much variance.[4]

For the purposes of research, the wards in Mobile were classified according to economic level and percentage

[4] William Buchanan, Understanding Political Variables (New York, 1969), pp. 276-278.

of the black registered voters in each ward. These classifications resulted in seven groups of voters in Mobile: low-income black, low-income white, lower-middle income black, lower-middle income white, middle-income white, upper-income white, and low-income racially mixed. The categories are purely subjective. Low-income wards are those with per capita income of less than $3499; lower-middle income wards have an average per capita income of $3500 to $4499; middle-income wards have an average per capita of $4500 to $5599; and upper income wards are those which have an average per capita income of over $5599. A ward in which 75 percent of the registered voters are black is considered a black ward. These classifications are important only for the purpose of grouping wards for display in tables and for discussion. The actual statistical testing was done by working with individual wards, not with groups.

Correlation of Demographic Features

It is not a novel idea to state that certain relationships exist between demographic characteristics of a population and political participation. The existence of these relationships has been discussed by Gosnell, Cyburn,

that might exist between social, economic, and demographic factors on the one hand and political behavior on the other. In order to insure that the groups studied are statistically homogeneous, they have been subjected to statistical treatment, which determined that the difference in political behavior between the groups is greater than the relationship within the groups.

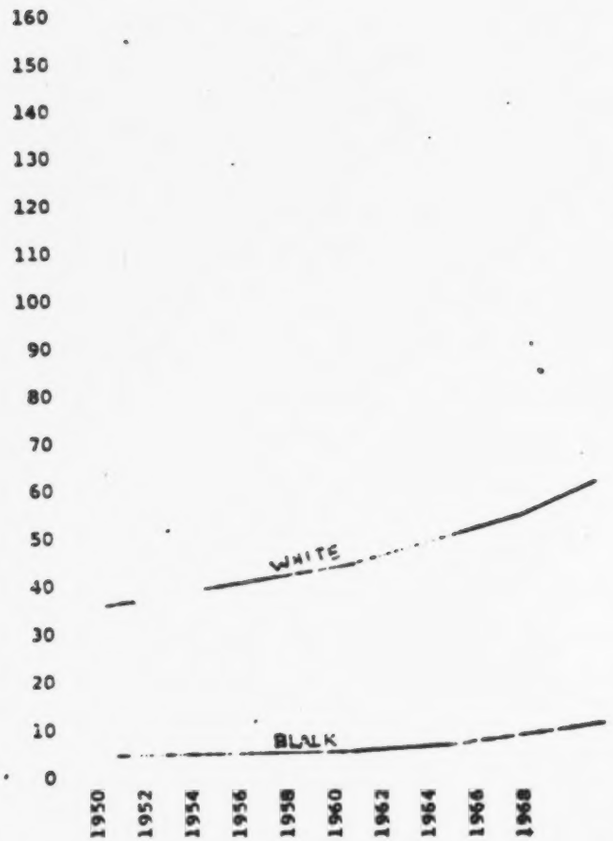
Voter registration was chosen as a means of measuring political behavior because it is a relatively stable variable, varying only slightly within a given area over a period of time. There is, however, some instability in the percentage of voting-age population registered in the Negro wards when revised over a long period of time. This is due to the very sizeable increase in Negro registration since the Voting Rights Act of 1965, as indicated in Chart I. Nevertheless, registration is a factor in political behavior and it is a measure of political participation, since the unregistered citizen cannot indicate his political preference through voting.

Data Sources

The demographic variables were selected in part from a study by Campbell, Gurin, and Miller, The Voter

CHART I

VOTER REGISTRATION IN MOBILE, ALABAMA



Source: Board of Registrars, Mobile County, Official List of Voters, 1948-1970.

affecting the black wards. Registration of voters and voter falloff in little publicized elections such as referendums are also important in the understanding of the role of blacks in Mobile politics.

Although blacks did not register in great numbers until after the passage of the 1965 Voting Rights Act, it is nevertheless worthwhile to compute statistics on turnout before this date for a basis of comparison. As Chart I (page 37) indicates, there has been a rapid increase in registration of blacks since the Voting Rights Act; but the chart also reveals that there has been a correspondingly rapid increase in the number of white registrants. Perhaps a comparison of turnout data for elections before and after 1965 can give researchers some idea as to the relative position of Negroes in regard to total voter turnout before and after the Voting Rights Act.

The attitude in Mobile County toward Negro suffrage has been less restrictive than in some other areas of Alabama, such as many black belt counties where few, if any, Negroes were registered prior to 1965. An assessment of a Negro's freedom to register in Mobile is difficult, but it is probably safe to speculate that, at least since 1965, Negroes

have been able to register and vote in Mobile with a minimum of difficulty.

The latest reliable figures on registration by race are those of 1964, since race is not designated on registration forms after that year. Any projection from 1964 to date is difficult; the Justice Department estimates are by state only and are not broken down by county. Luckily, the Southern Regional Council in Atlanta does publish registration figures by race and by county.[5] Using those figures and census data projections from the Southern Regional Planning Commission, it is possible to project reliable figures on Mobile registration by race and by ward. These are presented in Table I (page 48) and are reflected in Chart I (page 37), which shows the growth of Negro registration in Mobile from 1948 to the present.

Registration is but one side of the coin. To register is only part of the action of voting, and data reveals that Negroes do not exercise the right to vote in as high a percentage as do whites in Mobile. For example, in the 1968 presidential election, a great deal of effort was made to get Negroes to the polls, in an idealistic hope of preventing

[5] Voter Registration in the South (Atlanta, 1970).

Wallace, at least, from receiving a majority in Alabama. In Mobile County, the turnout for Humphrey in the black wards was sizable, as will be discussed in a later section of this paper, but the falloff between the vote for president and the vote for congressman was significant, as is indicated by Figure I. The falloff is even more extraordinary when one considers that Bobel Beasley, a Negro, was a candidate for Congress on the National Democratic Party of Alabama ticket.

FIGURE I

Negro Voter Turnout
1968 Presidential and Congressional Races

	Total Registered	Presidential Vote	Congressional Vote
Ward 1	720	492	163
Ward 10	3458	2383	751
Ward 31	578	505	354
Ward 32	1048	745	236

Source: Official Canvas, Tabulation and Declaration of Presidential and Congressional Races Held in Mobile County, Alabama, 1968.

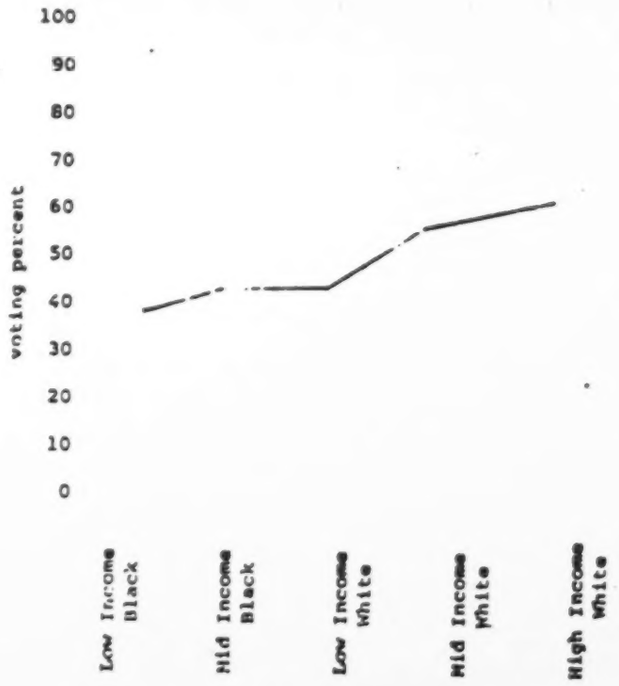
Types of Elections

There is also considerable variation in turnout between types of elections held in Mobile. Turnout consistently becomes less as the level of office at stake declines. Presidential, gubernatorial, and city commissioner elections receive fair turnout, but the turnout for other offices, such as the state legislature, gets pitifully poor. The variations in turnout between types of elections cuts across both racial and economic lines, although the higher economic areas tend to turn out a large percentage of registered voters to the polls in about the same relative degree in each type of election.

Chart II shows the percentage of voter turnout by socioeconomic/racial groupings for the Mobile City Commission races, 1953 through 1969. As the chart indicates, there is a sizeable difference in turnout in these races when compared by economic level. The turnout in both the low-income black and the low-income white areas remains below the higher economic wards of both races. It may also be noted that the relative turnout in the low economic wards varies according to race as well as economics. To show the correlation in more precise form, when race and turnout are compared within

CHART II

TURNOUT AND SES GROUP, CITY COMMISSION RACES 1953-1969



Source: Official Canvas, Tabulation and Declaration of City Commission Races Held in Mobile County, Alabama, 1953, 1957, 1961, 1965, 1969.

the same economic level by the Spearman Rank Coefficient, the correlation coefficient is .761, indicating a significant relationship between race and turnout. Likewise, when the Spearman statistic is computed for turnout and economic level, the correlation is significantly high at .742. As Table II presents, the correlation between race and turnout and between economics and turnout remains high in each of the City Commission races presented here.

The Spearman correlation remains significant in all the local elections presented in this paper except the 1966 School board Election and the 1969 Special Legislative Race, as is indicated in Table II. These two races represent the appearance of a Negro running for office, a rare occurrence in Mobile politics. In 1966, a black candidate, Dr. W. L. Russel, attempted to gain a seat on the county school board, which is elected in Alabama. The exercise was actually more an attempt to encourage blacks to register and vote than an effort to elect a black office-holder; the black leadership, which gave Russel its full support, realized that he had little real chance of victory, but it was an historical event in Mobile, nevertheless. In the six-man first election, Russel and Henry Sanders, a white candidate, emerged

TABLE II

TURNOUT IN SELECTED ELECTIONS IN MOBILE

GROUP*		A	B	C	D	E	F
CITY COMMISSION RACES							
	1953	.39	.41	.44	.45	.48	.51
	1957	.38	.44	.43	.48	.53	.58
	1961	.37	.43	.41	.51	.54	.61
	1965	.31	.33	.41	.40	.49	.51
PRESIDENTIAL RACES							
	1948	.38	.47	.59	.61	.72	.74
	1952	.59	.67	.69	.73	.82	.83
	1956	.54	.58	.65	.70	.80	.79
	1960	.64	.68	.61	.68	.83	.84
	1964	.72	.78	.69	.71	.86	.83
	1968	.75	.78	.71	.81	.84	.82
GUBERNATORIAL PRIMARIES	1952	.37	.43	.58	.61	.67	.69
	1958	.36	.41	.51	.63	.65	.69
	1962	.39	.45	.58	.63	.68	.74
	1966	.72	.74	.77	.79	.84	.81
	1970	.73	.72	.79	.80	.83	.84
LEGISLATIVE PRIMARIES	1952	.21	.19	.34	.41	.45	.56
	1958	.16	.14	.29	.35	.51	.43
	1962	.29	.38	.47	.56	.57	.61
	1966	.31	.40	.46	.55	.59	.62
	1969 (S)	.71	.74	.75	.77	.80	.79
	1970	.34	.36	.41	.51	.53	.66

*A=Low Income Black Wards
B=Mid Income Black Wards
C=Low Income White Wards
D=Low-Mid Income White Wards
E=Mid Income White Wards
F=High Income White Wards

Source: Official Canvas, Tabulation and Declaration of City Commission Races Held in Mobile County, Alabama, 1953, 1957, 1961, 1965, 1969.

as the top two candidates. In the resultant runoff, Russel was defeated by more than 8,000 votes, but he ran extremely well in the black areas. In fact, the percentage of vote for Russel in each ward corresponded closely to the percentage of Negro voters in that ward. The vote for Russel was almost totally from black areas of the city. This observation remains true today: with a black candidate in the race, the vote will be split precisely along racial divisions of the city.

About the same phenomenon was observed in the 1969 Special Legislative Race. Negro candidates filed to contest each of the two seats being filled by the special election. Clarence Montgomery, principal of St. Elmo High School, ran for one of the seats. Montgomery had been active in local community affairs for several years, and he was especially well-educated, holding a Master of Arts degree from Columbia University Teacher's College. He ran a campaign aimed directly at the black community, but he was arrested for driving while intoxicated during the campaign, and this alienated several of the local black church leaders and hurt his "respectability" in all parts of Mobile. It

was interesting that the arrest made the front page of the local daily, the Mobile Press-Register,[7] an uncommon place for such stories.

T. C. Bell, a local black barber, filed for the other seat. Bell had worked for years with the established Negro leadership in Mobile, but had fallen into disfavor with the militant black leadership, especially Mobel Beasley. His business had been set on fire once and bombed another time. His customers and other barbers in his shop were often intimidated; slowly, his business declined from a six-chair shop to only one chair. Under this type of pressure, Bell showed great courage in seeking public office.

Also running for office (against Bell) was a local insurance executive, W. B. Westbrook. Westbrook ran an openly segregationist campaign, using school integration policies as his major issue. He formed a front organization, Stand Together and Never Divide (S. T. A. N. D.), to sponsor his efforts in the campaign. It is a credit to Mobile that Westbrook received only 6.2 percent of the vote.[8] However,

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[7] The Mobile Press-Register, October 14, 1969, Sec. A, p. 1.

[8] Official Canvas, Tabulation and Declaration of a Special Legislative Election held in Mobile County, Alabama, 1969.

the S.T.A.N.D. organization is still alive and well in Mobile, prospering on attention accrued in its stand against busing. As this is being written, Westbrook has again filed to run for a seat on the school board.

Also in 1969, the Republican party felt strong enough to demand representation in the county's legislative delegation. A local attorney, Bert Nettles, filed for one of two vacant seats in a special 1969 legislative contest. The Democratic party in the county had a candidate who was supported by George C. Wallace, Sage Lyons, whom they wanted elected at any cost. Since two black candidates were filing--one for each seat--it was feared that a head-on confrontation between Nettles and Lyons would result in a plurality for a black in one of the elections. Thus an agreement was reached: Lyons would run for one place; Nettles for the other. In return, the Democratic County Committee agreed that Nettles would face no strong opposition in his contest. Since this was a special election, the Democratic County Committee certified the Democratic candidates without primary elections and could keep their promise not to run a candidate against the Republican, Bert Nettles. This arrangement, however, could not have been made had not

a sizeable number of the County Democratic Executive Committee supported Nettles. Thus, the election of both Nettles and Lyons was insured.

The voting fell into racial divisions, with Montgomery and Bell receiving majorities in each of the black wards. It will be noted, however, that Bell ran considerably behind Montgomery in each of the black regions, indicating the strength of Beasley's opposition to his candidacy. Lyons ran well ahead of Nettles in the race, showing especially his strength in the lower-middle income white wards. But, both Lyons and Nettles did quite well in all areas of the city except the black regions, proving it possible for a Republican to win a seat in the Alabama legislature, a feat deemed impossible until after 1969.[9]

This examination of voting in Mobile reveals that the turnout patterns here follow socioeconomic lines in about the same manner as studies in other areas have revealed. Using Scammon's words, "the unblack, the unpoor, and the unyoung."[10]

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[9] Ibid.

[10] Richard M. Scammon and Ben J. Wittenberg, The Real Majority (New York, 1969), pp. 45-61.

The Pearson computation again reveals the racial implication of the voting. A coefficient of −.92 indicates an almost perfect negative correlation of the number of Negroes in a ward and the vote for Wallace. The economic breakdown is peripherally high at -.43, indicating that Wallace did better in the upper-income areas than in the poorer wards. This is, however, misleading. When the black wards are removed from consideration, a truer picture is presented. A coefficient of .84 is computed, showing that, in the white wards, Wallace did better in the lower-income areas than in the more affluent districts. This is no doubt a reflection of the traditional loyalty of the white middle-class to the Republican party. In any event, Wallace so overwhelmed his opposition in Mobile that the scattered vote for Humphrey and Nixon is virtually meaningless, except in the Negro wards, where Humphrey did very well.

Presidential elections in Mobile have gone in the same direction as have other elections: race has emerged as the greatest issue. To better dramatize that proposition, a closer look will be given to two hypotheses:

1. Negroes have declined in political power in Mobile since the 1960's.

2. An alliance of the "have-nots" against the "haves" has not resulted from larger Negro registration, as V. O. Key suggested might occur.

Figure XVII presents a percentage comparison of the vote in the Mobile elections discussed above, arranged to test the above hypotheses. The percentage difference between votes cast for the winning candidates in the lower-income black wards and the lower-income white wards is indicated. Likewise, this statistic is used to compare the votes cast in the low-middle income black and white wards (groups three and four). Since the income of these groups is relatively the same, a high percentage difference will show a voter choice made on the basis of race, rather than economics.

Hypothesis two is difficult to test, since the relationship between racial composition of the wards and economic level of the area is so closely aligned in Mobile. Figure XVIII, however, presents a comparison of vote between the lower-income white wards and the higher-income white wards. By eliminating black wards from consideration, the influence of race as a factor in the comparison is held at a minimum. The statistics presented in Figure XVII support the hypothesis that black electoral strength has decreased

FIGURE XVII

Comparison of Black/White Voting in Selected Economic Groups

Election		Percentages of Winners					
City Comission		Low Black	Low White	Diff.	Low-Mid Black	Low-Mid White	Diff.
953	Finance	57.63	53.30	4.33	47.50	49.67	1.17
	Works	73.73	68.30	5.43	60.10	67.37	7.37
	Police	57.93	54.10	3.17	53.30		
957	Finance	81.59	54.31	27.19	58.24	51.46	6.78
	Works	83.41	64.38	19.03	75.22	65.64	9.58
	Police	77.54	53.31	25.25	52.16	84.89	32.73
961	Finance	94.31	46.41	47.90	91.30	50.94	40.36
	Works	16.22	48.04	29.82	22.51	55.67	33.16
	Police	14.21	46.56	32.35	31.44	53.26	21.86
965	Finance	89.01	43.29	45.72	87.48	46.73	40.75
	Works	32.11	49.75	17.64	19.30	51.02	31.72
	Police	28.83	82.60	53.77	27.00	78.90	51.90
969	Finance	11.25	53.63	42.38	5.61	65.65	60.04
	Works	34.18	56.91	22.73	19.11	54.12	35.01
	Police	31.38	87.15	55.77	28.17	81.40	53.23
Gubernatorial							
954		87.39	83.58	3.81	82.19	79.82	2.37
958		14.61	45.70	28.09	37.15	54.21	17.04
962		13.51	43.90	30.39	46.00	52.81	6.81
966		9.04	61.05	52.01	6.71	54.14	47.43
970		7.41	86.31	78.90	1.04	73.08	72.04

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FIGURE XVII (continued)

Election		Percentages of Winners					
Presidential		Low Black	Low White	Diff.	Low-Mid Black	Low-Mid White	Diff.
1948		80.96	78.60	2.36	80.50	78.42	2.08
1952		43.74	49.00	5.26	39.40	55.18	15.78
1956		45.73	51.10	5.37	42.20	58.37	15.17
1960		73.26	67.15	5.11	58.90	53.27	5.63
1964		9.31	84.60	75.29	1.01	75.91	74.90
1968		8.10	85.80	77.70	1.13	74.90	73.77

Source: Probate Court Records

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since the 1960's. The observation is clear: with the exception of city commissioner Joseph Langan, no candidate who has won a majority in the black wards of Mobile has also carried a majority in the entire city since 1960. As the Figure indicates, before 1960, the difference between black and white voter choice is not greatly significant in most races when economic level is held constant. While the black vote was disproportionately small compared to the number of Negroes residing in Mobile, their votes were often important enough to be sought. Since 1960, this has not been true; identification with the black wards is the "kiss of death" for an office-seeker in Mobile. The black voters constitute such a visible and emotional issue to Mobile's white voters that any identification with blacks in Mobile will produce a reaction by white voters and defeat the black-supported candidate. Thus, while the numbers of blacks voting has increased, the relative importance of the black vote is less than before the civil rights movement of the 1960's.

Race is perhaps the reason that there is little deviation in voting by whites regardless of economic level in the city of Mobile. Figure XVIII presents a comparison of the vote between the lowest income and the highest income white

Figure XVIII

Comparison of Low/High Income White Wards in Mobile Voting

Election	Percentages of Winners		
City Commission	Low White	High White	Diff.
1953 Place One (Finance)	53.30	52.40	.90
Place Two (Works)	68.30	65.80	2.50
Place Three (Police)	59.10	53.15	5.95
1957 Place One	54.31	51.13	3.18
Place Two	64.38	66.83	2.45
Place Three	52.31	33.41	18.90
1961 Place One	46.41	51.62	5.21
Place Two	46.04	63.14	17.10
Place Three	46.56	61.75	15.12
1965 Place One	43.29	44.63	1.34
Place Two	49.75	54.70	4.95
Place Three	82.60	78.86	3.74
1969 Place One	53.63	50.78	2.85
Place Two	56.91	56.90	.01
Place Three	87.15	74.13	13.02
Gubernatorial			
1954	83.50	77.84	5.74

FIGURE XVIII (continued)

Election	Percentages of Winners		
	Low White	High White	Diff.
Gubernatorial			
1950	45.70	59.12	13.42
62	43.90	40.90	3.00
1966	61.05	52.11	8.94
1970	86.31	68.98	17.33
Presidential			
1948	78.60	75.25	3.35
1952	49.00	53.40	4.40
1956	51.10	55.60	4.50
1960	67.15	39.06	28.09
1964	84.60	73.14	11.46
1968	85.80	67.16	18.64

Source: Probate Court Records

wards. The figures presented here indicate that there is no major difference in voting patterns between low and high income white areas in Mobile.

Except for the 1957 and 1961 city commission races for Place Three (Public Works Commissioner), and the 1964 Place Two (Police Commissioner) race, there have been no major differences in voting between the groups in city commission races. Both of these races involved Commissioner Hackmeyer, who, as previously mentioned, attempted a low-income black and low-income white alliance. He was successful, as figures indicate, in gaining support from this alliance, but it did not produce enough votes to keep him in office after the 1957-1961 term.

The 1961 Police Commissioner race (Place Two) also shows some variation between groups (17.10 percent). This can most likely be explained by the candidacy of McNally, a Republican, who drew disproportionate strength from the traditional Republican areas--the upper-income wards. After 1961, the local elections show no major difference in white wards of high or low income. This indicates that the choice of voters was determined by something other than economics.

The gubernatorial and presidential contests show little difference in economic level after 1960. True, the Democratic ticket in 1960 (Kennedy) and in 1968 (Wallace) did fare better in the low-income white wards than in the upper-income white areas, but this can be explained by the traditional support for the Republican presidential candidate in these areas. The 17.33 percent difference in the 1970 gubernatorial primary is due probably to the Wallace appeal to race, which had more support in the low-income areas than in the high. But, even in the upper-income areas, Wallace won a landslide 68.98 percent of the popular vote.

Thus, this examination of the vote reveals that an alliance of the "have-nots," cutting across racial lines, against the "haves" has not materialized in Mobile, nor is one likely. Likewise, the position of the black vote in Mobile is becoming more and more tenuous. Presently, identification with the black vote spells defeat for any candidate in Mobile. In practical terms, this means that blacks have less influence than they had before the 1960's, and that candidates for office are able to ignore black interests and still be elected. It is ironic that the

civil rights movement--which intended to increase black political power in the South--has had the reverse effect in Mobile.

and social difference involved. However, if, as seems to be the trend, the national Democratic party continues to force the state and local parties to accept more black members on the committees and delegations, and if the blacks in Mobile continue to use the Democratic party as the vehicle for their political goals, it is likely the Republican party can forge an all white coalition. Whites of the higher economic levels in Mobile will probably continue to be more civic-minded than those of the lower income groups. Yet, this should not prevent a political alliance of convenience for both groups. Political considerations may overcome social differences and aid in the formation of an all-white, racially conservative Republican party.

The obstacle to Republican supremacy in Mobile lies with George C. Wallace. Wallace presents the ideal combination of economic liberalism and racism that apparently appeals to the working class white Mobilians. If he can salvage the Alabama Democratic party and insure that it continues in his mold, the state Democratic party will remain strong.

In any event, the Negro is the loser. As figures in the preceding chapter show, the Negro is a political liability in Mobile today. Whichever party emerges as the

majority party in Mobile, the Negro will be excluded. A white voting coalition will remain consistently supreme in Mobile.

CHAPTER VI

CONCLUSIONS

The role of the black vote has changed dramatically in Mobile since 1960. Prior to the 1960's, the black vote was disproportionately small as compared to the Negro population of the city. Yet, this small, well-controlled black vote was used effectively in coalitions with white candidates. While elections could not be won solely on the strength of the black vote, blacks did enjoy power in close elections where a bloc vote could make the difference. Apparently, as long as the black vote was small and highly sought-after by candidates, there was no real white reaction to candidates receiving black support. This can be seen by the data presented in this paper, which show that prior to 1960, in each election studied, the candidate receiving a majority in the city as a whole also received a majority in the black wards. Figures comparing black and white voting patterns prior to 1960 show little deviation on the basis of race, except in elections such as the 1958 gubernatorial primary, where race was a major campaign issue. In local

elections, race was not a major issue and the Negro was an politically invisible entity.

The 1960's produced bold differences in Mobile political patterns. Since World War II, industrialization has greatly increased in Mobile and with it the migration of people from the surrounding rural counties. The rise of a large working class in Mobile created an environment for competitive politics. The position of the Negro in Alabama politics is of importance equal to industrialization and urbanization. Cosman,[1] in his examination of the 1964 presidential election, found white reaction to blacks to be stronger in the five Deep South states, and more prominent where the black population approached thirty percent. That race is a major factor strong enough to override economic issues is supported by the data presented in this paper. Were the race issue not present, a voting coalition representing economic groups might have evolved in Mobile. As V. O. Key observed, ". . . the South takes positions in mass opinion on broad questions of policy (not involving race) remarkably similar to those of the nation."[2]

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[1] Cosman, op. cit., p. 121.

[2] Key, Public Opinion and American Democracy (New York, 1961), p. 104.

The civil rights movement of the 1960's changed the Negro's role in the South and in Mobile. With the institutions of segregation breaking down, Negroes began to make more demands upon society. Those demands culminated nationally in the passage of the Civil Rights Act of 1964, which allows blacks equal access to public accommodations, and the Voting Rights Act of 1965, which insures Negroes the right to register and vote. In the face of Negro demands, whites in Mobile united politically. The Negro became a highly emotional and visible issue.

The consequences of Negro visibility in Mobile can be briefly summed up by observing that, since 1960, only one candidate has carried the black wards in Mobile and also won a majority of the city as a whole. The Negro is such a visible issue that any identification with the black community will result in a white reaction and defeat the black-supported candidate. Thus, while the numbers of blacks voting in Mobile have increased sharply since 1960, the power of blacks to positively influence elections has decreased.

The alliance of the "have-nots" which Key, Heard, Daniel, and Middleton foresaw in their predictions has not come about

in Mobile. The idea of a "populist" alliance of the lower-income groups is both logical and attractive, but it has not occurred here. The only semblance of such an alliance in Mobile came in 1957, when Hackmeyer was elected by carrying the low-income wards of Mobile, cutting across racial lines. But this was prior to Negroes becoming highly visible in Mobile politics, and it was also partly caused by a five-man race which greatly split up the white middle-class vote. Hackmeyer was not able to maintain this alliance and was defeated the next election.

A populist alliance based on the concept of New Deal coalitions has simply eluded Mobile. This city has no traditional progressive voting bloc, such as the ethnic groups of the north. As data in this paper indicate, the low-income groups in Mobile have been badly split politically since the 1960's. The black voters are Mobile's liberals, as is manifested by their support of the national Democratic party ticket and the more moderate state and local candidates, such as Albert Brewer and Joseph Langan.

The low-income whites have failed to respond to the liberalism of the 1960's. National programs intended to raise the standard of living of persons in this economic class have

LOG DRIVE CART SPEC CART AVAIL PHY DRIVE
0000 0001 0001 0000

V2 M11 ACTUAL 8K CONFIG 8K

// EXEC STATS 1

*FILE512:STUDT1

NOTED THAT RECORD RECEIVED ON MAY 29/1982

Plaintiff's Exhibit 10

ORIGINAL DATA

0.0500	963.0000	0.7630
0.0300	1260.0000	0.2730
0.0500	1882.0000	0.1740
0.1100	2894.0000	0.0860
0.2500	4858.0000	0.1860
0.2700	4260.0000	0.1440
0.3200	1881.0000	0.1930
0.1700	4710.0000	0.1050
0.3000	3733.0000	0.2300
0.9700	1140.0000	0.9880
[illegible]	[illegible]	0.1870

0.0100	4421.0000	0.5890
0.1700	1642.0000	0.1520
0.6000	2698.0000	0.2990
0.3700	2526.0000	0.2900
0.1300	2284.0000	0.1010
0.1200	4462.0000	0.1070
0.1400	3947.0000	0.1160
0.1300	3412.0000	0.1320
0.1400	2723.0000	0.1410
0.9900	1782.0000	0.3260
0.1900	2237.0000	0.1380
0.8900	1232.0000	0.6970
0.9000	1415.0000	0.7090
0.0900	1963.0000	0.0730
0.1100	1581.0000	0.0820
0.1400	2259.0000	0.1120
0.1300	3682.0000	0.1210
0.1400	3195.0000	0.1190
0.1000	3480.0000	0.1130
0.1300	2361.0000	0.1270

NUMBER OF VARIABLES OBSERVED = 3

NUMBER OF VARIABLES USED IN THE ANALYSIS = 3

```
NUMBER OF VARIABLES OBSERVED = 3          NUMBER OF VARIABLES USED IN THE ANALYSIS = 3

NUMBER OF OBSERVATIONS= 30

THE DEPENDENT VARIABLE IS NUMBER 3


AVERAGES
VAR( 1)=      0.3706; VAR( 2)=   2604.7000; VAR( 3)=      0.2562

STANDARD DEVIATIONS
VAR( 1)=      0.3280; VAR( 2)=   1109.1649; VAR( 3)=      0.2399

SIMPLE CORRELATION COEFFICIENTS
VARS( 1, 1)=  0.999; VARS( 1, 2)= -0.493; VARS( 1, 3)=  0.839
VARS( 2, 2)=  1.000; VARS( 2, 3)= -0.442




STEP NUMBER  1                                  ENTER VARIABLE  1
STANDARD ERROR OF ESTIMATE=          0.13278
MULTIPLE CORRELATION COEFFICIENT =  0.8392
COEFFICIENT OF DETERMINATION =  0.7042
F VALUE; (D.F.   1,  28)=          66.682
CONSTANT TERM=       0.0287

VAR          COEFF        STD DEV      T VALUE     BETA COEFF
                           COEFF
  1          0.6138       0.0751        8.1659       0.8392



STEP NUMBER  2                                  ENTER VARIABLE  2
STANDARD ERROR OF ESTIMATE=          0.13498
MULTIPLE CORRELATION COEFFICIENT =  0.8398
COEFFICIENT OF DETERMINATION =  0.7053
F VALUE; (D.F.   2,  27)=          32.511
```



```
                                                ENTER VARIABLE  3
STANDARD ERROR OF ESTIMATE=          0.13498
MULTIPLE CORRELATION COEFFICIENT =  0.8398
COEFFICIENT OF DETERMINATION =  0.7053
F VALUE; (D.F.   2,  27)=          32.511
CONSTANT TERM=       0.0568

VAR          COEFF        STD DEV      T VALUE     BETA COEFF
                           COEFF
  1          0.6004       0.0870        6.9241       0.8209
  3         -0.0068       0.0068       -0.9988      -0.0570
```

VOTE FOR RUSSELL SCHOOL BOARD DEMO RUNOFF MAY 1996

Plaintiffs Exhibit 19

ORIGINAL DATA

510a

0.6874	1494.0000	0.8730
0.3312	2330.0000	0.3970
0.1956	2646.0000	0.1090
0.0000	3113.0000	0.0480
0.0530	2648.0000	0.0930
0.4115	1798.0000	0.2190
0.1437	1905.0000	0.1040
0.1307	1939.0000	0.1220

NUMBER OF VARIABLES OBSERVED = 3 NUMBER OF VARIABLES USED IN THE ANALYSIS = 3

NUMBER OF OBSERVATIONS= 46

THE DEPENDENT VARIABLE IS NUMBER 3

AVERAGES
VARI 1)= 0.3397, VARI 2)= 2646.6521, VARI 3)= 0.3479

STANDARD DEVIATIONS
VARI 1)= 0.3940, VARI 2)= 1170.6889, VARI 3)= 0.3203

SIMPLE CORRELATION COEFFICIENTS
VARS(1, 1)= 1.000, VARS(1, 2)= -0.364, VARS(1, 3)= 0.959
VARS(2, 2)= 0.999, VARS(2, 3)= -0.298

STEP NUMBER 1 ENTER VARIABLE 1
STANDARD ERROR OF ESTIMATE= 0.09083
MULTIPLE CORRELATION COEFFICIENT = 0.9599

511a

STEP NUMBER 2 ENTER VARIABLE 2
STANDARD ERROR OF ESTIMATE= 0.08566
MULTIPLE CORRELATION COEFFICIENT = 0.9638
COEFFICIENT OF DETERMINATION = 0.9328
F VALUE= (0,F, 2, 43)= 298.499
CONSTANT TERM= -0.0613

VAR	COEFF	STD DEV COEFF	T VALUE	BETA COEFF
1	0.9868	0.0364	25.9649	1.0016
2	0.0000	0.0000	2.6964	0.1164

STEP NUMBER 1
STANDARD ERROR OF ESTIMATE= 0.09083
MULTIPLE CORRELATION COEFFICIENT = 0.9599
COEFFICIENT OF DETERMINATION = 0.9214
F VALUE= (0,F, 1, 44)= 516.166
CONSTANT TERM= 0.0393

VAR	COEFF	STD DEV COEFF	T VALUE	BETA COEFF
1	0.8690	0.0362	22.7192	0.9599

513a

0.0530	3646.0004	0.1310
0.1397	1959.0002	0.1700
0.1437	1905.0002	0.1130
0.0000	3113.0004	0.0960
0.1936	3646.0004	0.2490
0.3912	2330.0004	0.3250
0.0674	1496.0002	0.0460
0.4956	2377.0004	0.3550
0.2493	2099.0004	0.1850
0.0150	3106.0004	0.1780
0.0004	2937.0004	0.1940
0.0008	4197.0009	0.1560
0.0043	3244.0004	0.1660
0.9995	1109.0002	0.9550
0.0509	6749.0009	0.9520
0.0011	2561.0004	0.2130
0.0934	3400.0004	0.1920
0.0336	3196.0004	0.1870
0.0574	3602.0004	0.1650
0.2546	2259.0004	0.2320
0.2691	1501.0002	0.1460
0.2356	1963.0002	0.1170
0.9165	1419.0002	0.0910
0.9477	1232.0002	0.9200

512a

RUNOFF PRIMARY JUNE2 1970 JACOBS

Plaintiffs Exhibit 34

1-1585

ORIGINAL DATA

0.9836	0963.0001	0.9200
0.9823	1988.0002	0.9350
0.9594	1882.0002	0.0470
0.0027	2994.0004	0.1770
0.1197	4038.0004	0.2660
0.0213	4260.0009	0.2560
0.2972	1981.0002	0.2890
0.0358	4716.0009	0.2010
0.2235	3243.0004	0.3290
0.9952	1164.0002	0.9430
0.1465	4421.0009	0.7320
0.2936	1842.0002	0.2660
0.7043	1698.0002	0.9290
0.3235	2524.0004	0.3490
0.0218	3284.0004	0.1340
0.0009	4462.0009	0.1800
0.0000	3547.0004	0.1760
0.0212	3412.0004	0.1570
0.8492	2723.0004	0.1350

```
 NUMBER OF VARIABLES OBSERVED = 3        NUMBER OF VARIABLES USED IN THE ANALYSIS = 3

 NUMBER OF OBSERVATIONS= 46

 THE DEPENDENT VARIABLE IS NUMBER 3

 AVERAGES
 VAR  1:=        0.31283; VAR  2:=     2644.65222; VAR  3:=        0.2756

 STANDARD DEVIATIONS
 VAR  1:=        0.3993; VAR  2:=     1170.47877; VAR  3:=        0.3016

 SIMPLE CORRELATION COEFFICIENTS
 VAR  1; 1:= 1.000; VAR  1; 2:= -0.6931; VAR  2; 2:= 1.000; VAR  1; 3:= 0.000
 VAR  2; 1:= 1.000; VAR  2; 2:= -0.870

                                ENTER VARIABLE 1  ?
 STEP NUMBER  1
 STANDARD ERROR OF ESTIMATE=          0.16181
 MULTIPLE CORRELATION COEFFICIENT =   0.9430
 COEFFICIENT OF DETERMINATION =       0.7160
 F VALUE; ID.F.  1,  45:=           111.378
 CONSTANT TERM=                       0.1481

 VAR          COEFF        STD DEV     T VALUE    BETA COEFF
                           COEFF
  1          0.7289       0.0690       10.5596       0.8465

                        CRITICAL STUDENT T VALUES

                        DEGREES OF FREEDOM =  45

 1-TAIL LIMITS   0.100    0.050    0.025    0.010    0.005

 TABLE VALUES    1.301    1.680    2.015    2.410    2.692
```



```
                                ENTER VARIABLE  2
 STEP NUMBER  2
 STANDARD ERROR OF ESTIMATE=          0.09935
 MULTIPLE CORRELATION COEFFICIENT =   0.9467
 COEFFICIENT OF DETERMINATION =       0.8963
 F VALUE; ID.F.  2,  451=           185.881
 CONSTANT TERM=                      -0.5602

 VAR          COEFF        STD DEV     T VALUE    BETA COEFF
                           COEFF
  1          1.0779       0.0546       19.6346       1.2516
  2          0.0001       0.0000        6.6179       0.8661

                        CRITICAL STUDENT T VALUES

                        DEGREES OF FREEDOM =  45

 1-TAIL LIMITS   0.100    0.050    0.025    0.010    0.005

 TABLE VALUES    1.301    1.680    2.015    2.410    2.692

 // END STATS   1
 *FILE(12,STUDU)
```

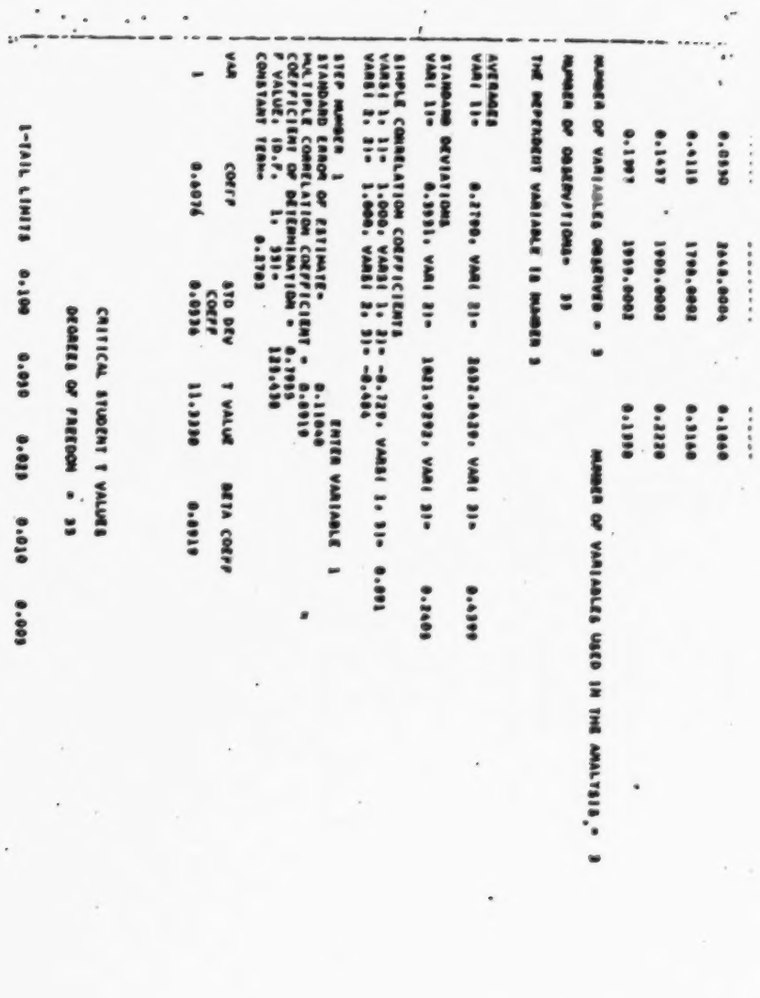
SCHOOL BOND PLACE 1 JUNE REDOUP 1970 PERCENT STILL RECEIVED

Plaintiffs Exhibit 53

ORIGINAL DATA					
0.6440	1792.0002	0.0900			
0.9100	1812.0002	0.9700			
0.9040	1267.0002	0.9000			
0.9040	1445.0002	0.8740			
0.9970	1092.0002	0.9390			
0.0360	2995.0004	0.2780			
0.0000	2712.0004	0.2880			
0.2700	3084.0004	0.4470			
0.0040	2930.0004	0.2940			
0.0070	2930.0004	0.2890			
0.0760	4444.0009	0.4720			

0.0000	1113.0004	0.1110			
0.0270	2010.0002	0.0170			
0.0000	2454.0004	0.0000			
0.0000	2517.0004	0.0000			
0.0000	2454.0004	0.0000			
0.0000	2493.0004	0.0000			

0.0720	2454.0004	0.0120			
0.0720	2472.0004	0.0270			
0.0720	2500.0004	0.0440			
0.0720	2517.0004	0.0440



	0.0150	2048.0004	0.1000	
	0.4118	1798.0002	0.3160	
	0.1457	1998.0002	0.2220	
	0.1967	1999.0002	0.1350	

NUMBER OF VARIABLES OBSERVED = 5 NUMBER OF VARIABLES USED IN THE ANALYSIS = 5

NUMBER OF OBSERVATIONS= 33

THE DEPENDENT VARIABLE IS NUMBER 5

AVERAGES				
VAR(1)=	0.2760.	VAR(2)=	2032.6420.	VAR(3)= 0.4999
STANDARD DEVIATIONS				
VAR(1)=	0.3931.	VAR(2)=	1821.9292.	VAR(3)= 0.2408

SIMPLE CORRELATION COEFFICIENTS

VAR(1):	1.000.	VAR(2):	-0.229.	VAR(3)= 0.091
VAR(2):	1.000.	VAR(2):	-0.000	

STEP NUMBER 1 ENTER VARIABLE 1

STANDARD ERROR OF ESTIMATE= 0.11040

MULTIPLE CORRELATION COEFFICIENT = 0.6010

COEFFICIENT OF DETERMINATION = 0.7995

F VALUE: 10.F: 1; 331= 125.030

CONSTANT TERM= 0.2703

VAR	COEFF	STD DEV COEFF	T VALUE	BETA COEFF
1	0.6036	0.0536	11.2330	0.8010

CRITICAL STUDENT T VALUES

DEGREES OF FREEDOM = 33

1-TAIL LIMITS	0.100	0.050	0.025	0.010
				0.005

— Plaintiffs Exhibit 53

CITY COMMISSION

includes these tests

Voyles Pearsons r

1953	1. Langan	2. Luscher Sr.	3. Hacknayer
Income	.38	.52	.41
Race	.41	.69	.34
1957	1. Langan	2. Luscher Sr.	3. Hacknayer
Income	.64	.89	.84
Race	.52	.38	.25
1961	1. Langan	2. McNally	3. Trismeier
Income	.32	.83	.81
Race	.71	.81	.82
1965	1. Langan	2. Mims	3. Outlaw
Income	.47	.93	.43
Race	.93	.96	.92
1969	1. Langan	2. Mims	3. Doyle
Income	.44	.90	.41
Race	.91	.95	.87
1973	1. Greenough/Bailey		2. Mims
Race	.79		.71

1 - Race is Variable unless stated

Regression - the numbers are circled on the chart.

1965	No.	Candidate	Coef.[1]	Data Base
	1	Langan	.71	Ours
	2	Mims	.67	Ours
	3	Outlaw	.77	Ours
	1	Langan	.86	Voyles
	2	Luscher	.67	Voyles Ours
1969				
	1	Langan	.74	Ours
	2	Luscher	.78	Ours
	3	Doyle(run-off)	.38	Ours
	1	Bailey	.82	Voyles
1973				
	1	Bailey(run-off)	.51	Ours
		Smith	.83	Ours
		Taylor	.90	Ours
		Albert	.80	Ours
	1	Greenough	.39	Voyles

Referendum

1963		.58	Our
		.80	Voyles 1960 Data
1973		.80	Our

School Board

1970	Jacobs (runoff)	.87	Voyles
	Jacobs (")	.84	Ours
1972	Koffer (")	.83	Voyles
1974	Gill (runoff)	.89	Ours

Clarence Montgomery - legislative race 1969 not included - race tested at .85.

COUNTY COMMISSION

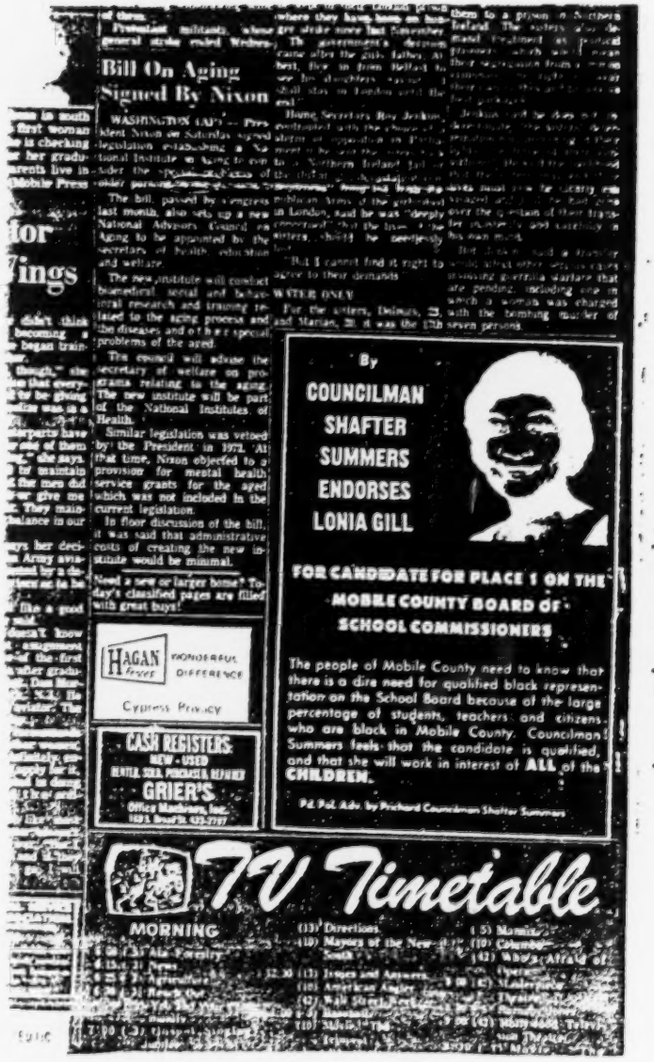
Regression		Candidate		Coef.	Data Base	
1968						
All Wards		1	Yeager	.46	Ours -	Gen.Elec.
"		2	Smith	.17*	"	"
"		3	Stevens	.06	"	"
City Wards		1	Yeager	.51	"	"
"		2	Smith	.10*	"	"
"		3	Stevens	.08	"	"
All Wards	'68 Run-off	1	Yeager	.78	Voyles	Primary
"	" "	2	Smith	.73	"	"
"	" "	3	Stevens	.90	"	"
1972						
All Wards		1	Yeager	.31	Ours	Gen.Elec.
"		2	Smith	.83	"	"
"		3	Haas	.81	"	"
City Wards		1	Yeager	.33	"	"
"		2	Smith	.84	"	"
"		3	Haas	.82	"	"
All Wards			Langan	.85	Voyles	Primary
"			Mrs. Stevens	.35	"	"
"			Cappe	.66	"	"

Additional School Board Races

1962 Run-off	Goode	.83	Voyles	1960 DATA
1966 Run-off	Russell	.95	Voyles	

* Testing Income

6-B Press Register
Mobile, Sunday June 2, 19.



Bill On Aging Signed By Nixon

WASHINGTON (AP) — President Nixon on Saturday signed legislation establishing a National Institute on Aging to work under the [illegible]

The bill, passed by Congress last month, also sets up a new National Advisory Council on Aging to be appointed by the secretary of health, education and welfare.

The new institute will conduct biomedical, social and behavioral research and training related to the aging process and the diseases and other special problems of the aged.

The council will advise the secretary of welfare on programs relating to the aging. The new institute will be part of the National Institutes of Health.

Similar legislation was vetoed by the President in 1972. At that time, Nixon objected to a provision for mental health service grants for the aged which was not included in the current legislation.

In floor discussion of the bill, it was said that administrative costs of creating the new institute would be minimal.

WATER ONLY

By COUNCILMAN SHAFTER SUMMERS ENDORSES LONIA GILL

FOR CANDIDATE FOR PLACE 1 ON THE MOBILE COUNTY BOARD OF SCHOOL COMMISSIONERS

The people of Mobile County need to know that there is a dire need for qualified black representation on the School Board because of the large percentage of students, teachers and citizens who are black in Mobile County. Councilman Summers feels that the candidate is qualified, and that she will work in interest of ALL of the CHILDREN.

Pd. Pol. Adv. by Prichard Councilman Shafter Summers

HAGAN HONORABLE DIFFERENCE Cypress Privacy

CASH REGISTERS NEW - USED RENTAL SALE PURCHASE REPAIRS GRIER'S Office Machines, Inc.

TV Timetable

MORNING

JUN

8-A Register & Press
Mobile, Saturday June 1, 1

Unique U.S. Map Comprises Indigenous Soils

By LOUIS ZADECKER II
Press-Register Reporter

A retired Florida drawbridge operator with a yen for travel has spent the past five years creating a most unusual map of the United States.

George M. Novatney, 68, of 2513 Daniels Road, Mobile, has carefully constructed a three-by-four foot map of the United States, including Alaska and Hawaii, from samples of dirt obtained from each of the 50 states.

Novatney, a former resident of Miami, Fla., collected soil samples from Texas, New Mexico, Arizona, Nevada, California, Colorado, Utah, Alabama and Florida during vacation trips. Friends supplied samples from other states they visited.

For distant states, Novatney used an ingenious method to get his samples. "In the Miami newspaper's Sunday roto section," he explained, "there was a 'riddle box' that carried the names and addresses of those submitting jokes. I would send them a stamped, self-addressed envelope requesting dirt from their backyards."

ALL 50 STATES

Eventually, Novatney accumulated samples from all 50 states, including one postmarked North Pole, Alaska. He then decided to create a mapmusing the samples to represent the states.

"I first traced a map of the United States," said Novatney, "on this table. I used plastic wrapping bands from cartons to outline the individual states. Then, I rested the soil samples with glue and poured onto the map."

The finished map is striking. The different and textures of dirt are misleading, especially from the Southwest.

Novatney plans to put plexiglas top over the map for protection. Then, he will use as a "conversation piece" coffee table" in his den.

Faulkner Registration Scheduled

BAY MINETTE, Ala. — Registration for the 1974 James H. Faulkner State Junior College summer session will be held on June 12 in the Ernest Stone Classroom Building, Dr. Burton C. Beck, dean of instruction, has announced. Registrations will begin at 8 a.m.

Classes will begin June 13, and the schedule will be from 8 a.m. to 1 p.m. The various departments will include the following courses:

Business department: economics, management, shorthand, basic typewriting, and business and professional writing.

Language Arts Department: English composition, literature, English literature, public speaking.

Mathematics Department: Basic math, introduction college math, algebra, trigonometry.

Natural Science Dept.: ogy, zoology, botany, chemistry and chemistry.

Physical Education Department: Tennis, softball, track.

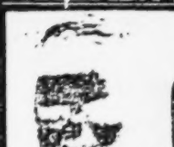
Social Science Dept.: history, U.S. history, psychology and sociology.

Technical Dept.: Landscape gardening, grain crop production, programming, lab and dental assisting.

Inflation Seen Averaging Ou

NEW YORK (AP) — Wilbur Mills, chairman House Ways and Means mittee, predicted Friday the rate of inflation will age out at 12 per cent a y

The Arkansas Democra during a visit at City Ha he foresees a further in in interest rates and a tion in national growth a sult of the inflationary sp



WHERE I STAND...

★ A return to the neighborhood school concept when the Federal Court busing orders expire this year.

★ An open-door policy so that any group or individual can come before the board and be heard without the present "red-tape"

DAN ALEXANDER
SCHOOL BOARD—PLACE 1
"A Man Who Cares About Your Child's Education"

Pd Pol Adv by Dan Alexander Mobile

WHY?

Bill Roberts filed his complete financial disclosure statement with the State Ethics Commission well before the original deadline set by the State Ethics Law. Both his and his family's business affairs have been a matter of public record for some time.

As of the statement of this ad (well past the original deadline) the Ethics Commission has yet to receive a financial disclosure state... from Maurice Downing.

JOHN LeFLORE

GERRE KOFFLER

WHO WILL RUN YOUR SCHOOLS?

GERRE KOFFLER FACTS:

RUNNING FOR PLACE NO. 3, SCHOOL BOARD COMMISSION, MAY 30th.

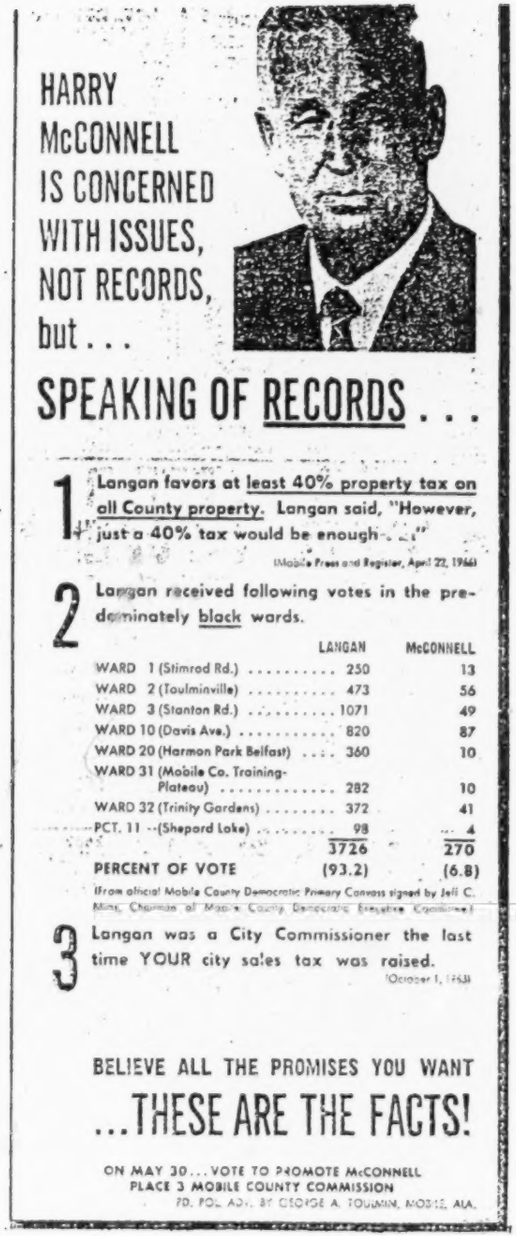
1. SIGNED AGREEMENT WITH NAACP TO ACHIEVE TOTAL INTEGRATION WITH TOTAL BUSING.
2. VERY ACTIVE IN THE MILITANT ORGANIZATIONS ACT, NAACP, NOW, NON-PARTISAN VOTERS LEAGUE, LEAGUE OF WOMEN VOTERS.
3. HAS ENTERTAINED BLACKS IN HER HOME.
4. HAS BEEN SEEN AND PHOTOGRAPHED IN COMPANY OF BLACK MALES.
5. UNDER INSTRUCTION OF ALBERT J. FOLEY IN THE CIVIL RIGHTS SCHOOL CURRENTLY.
6. POLLED 92% OF BLACK VOTE IN MAY 2, PRIMARY.

MAY 2 BLOCK VOTE

WARDS	Koffler	Sessions	Langan	McConnell
3 STANTON ROAD	746	170	1,071	49
10 DAVIS AVE.	529	123	820	87
31 PLATEAU	270	22	282	10
32 TRINITY GARDENS	320	24	372	41

PLEASE VOTE MAY 30

OFFICIAL D.B.E. REPORT DATE SIGNED MOBILE, ALA.



HARRY McCONNELL IS CONCERNED WITH ISSUES, NOT RECORDS, but . . .

SPEAKING OF RECORDS . . .

1. Langan favors at least 40% property tax on all County property. Langan said, "However, just a 40% tax would be enough . . ."

(Mobile Press and Register, April 22, 1966)

2. Langan received following votes in the predominately black wards.

	LANGAN	McCONNELL
WARD 1 (Stimrod Rd.)	250	13
WARD 2 (Toulminville)	473	56
WARD 3 (Stanton Rd.)	1071	49
WARD 10 (Davis Ave.)	820	87
WARD 20 (Harmon Park Belfast)	360	10
WARD 31 (Mobile Co. Training-Plateau)	282	10
WARD 32 (Trinity Gardens)	372	41
PCT. 11 --(Shepard Lake)	98	4
	3726	270
PERCENT OF VOTE	(93.2)	(6.8)

(From official Mobile County Democratic Primary Canvass signed by Jeff C. Mims, Chairman of Mobile County Democratic Executive Committee.)

3. Langan was a City Commissioner the last time YOUR city sales tax was raised.

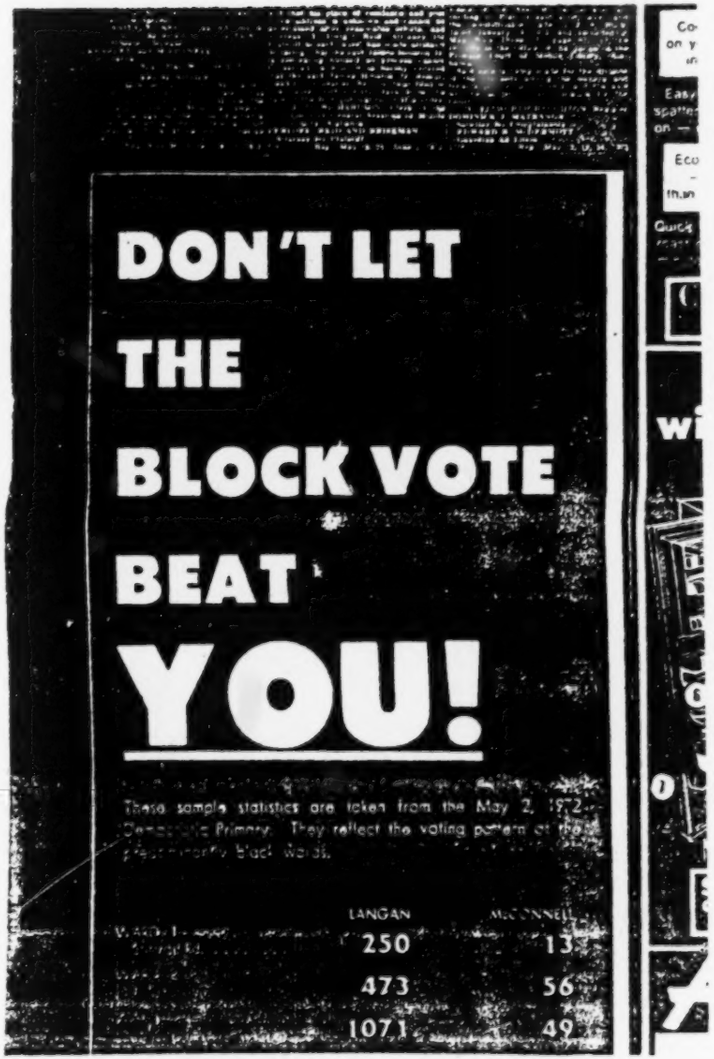
(October 1, 1963)

BELIEVE ALL THE PROMISES YOU WANT

...THESE ARE THE FACTS!

ON MAY 30... VOTE TO PROMOTE McCONNELL
PLACE 3 MOBILE COUNTY COMMISSION
PD. POL. ADV. BY GEORGE A. TOULMIN, MOBILE, ALA.

2-B Mobile Register
Friday May 26, 1972



DON'T LET THE BLOCK VOTE BEAT YOU!

These sample statistics are taken from the May 2, 1972 Democratic Primary. They reflect the voting pattern of the predominantly black wards.

	LANGAN	McCONNELL
WARD 1	250	13
	473	56
	1071	49

2-B Mobile Regis
(Friday May 26, 19

BEAT YOU!

	LANGAN	McCONNELL
WARD 1	250	13
WARD 2	473	56
WARD 9	1071	49
WARD 10	820	87
WARD 20	360	10
	282	10
	372	41
PCT. 11	98	4
TOTALS	3726	270
PERCENT OF VOTE	(93.2)	(6.8)

IT WILL TAKE YOUR VOTE ON MAY 30
TO BEAT THE BLOCK VOTE IN PLACE 3!

6-A Press Register
Mobile Sunday May 21, 19 72

...der, escaped from Draper Correctional Center Saturday in a state truck, officials said.
The escapees were identified as Joseph P. Cornelison, 40, sentenced from Mobile County to a life term for first degree murder, and Robert Warren Smith, 47, sentenced from Chilton County to 20 years for robbery.

...Kittrell, also of Rome, passengers in Myers' car, were hospitalized.
John A. Beech, 30, of Ellisville, was killed about 4:10 a.m. Saturday morning near Moselle on Highway 11, officers said he was rushed to a Hattiesburg hospital by helicopter ambulance but was dead on arrival.

...by discredited without my knowledge.
I am indebted to Rep. Callahan for this opportunity to ... myself fortunate to ... portunity to make ... upon this sole ... original letter.
CRAIG T. SHELDON
President Sav... Bo...
Glen Ellyn, Ill.

RE-ELECT HOMER L. SESSIONS
FOR PLACE THREE
Board of School Commissioners

- HOMER L. SESSIONS educated his children (Jerry and Sandra) in Mobile County public schools.
- HOMER L. SESSIONS favors: Continues to support concept of neighborhood schools and is opposed to forced busing for the sole purpose of racial balance.
- HOMER L. SESSIONS is a former official of one of the world's largest corporations.
- Mobile County School Board budget is the largest budget in Mobile County.
- Keep an experienced business man on the board.

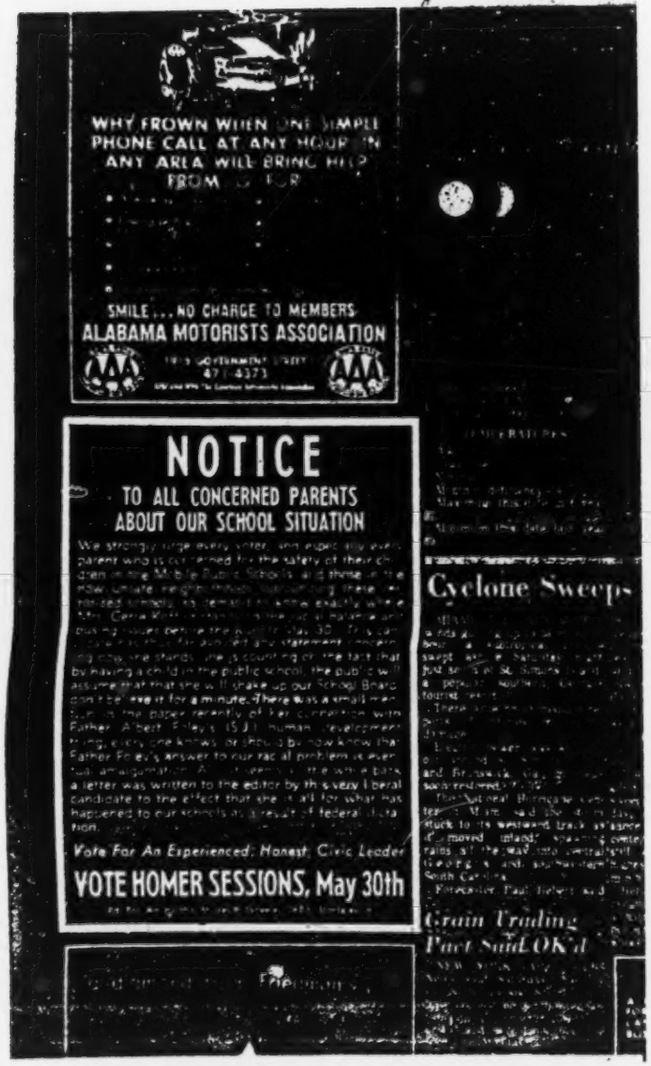
OPPONENT FAVORS

- Forced Busing
- Household Budget Experience

Paid Pol. Adv. Homer L. Sessions

Bill
Dixon

2-A Press Register
Mobile, Sunday
May 28, 1972



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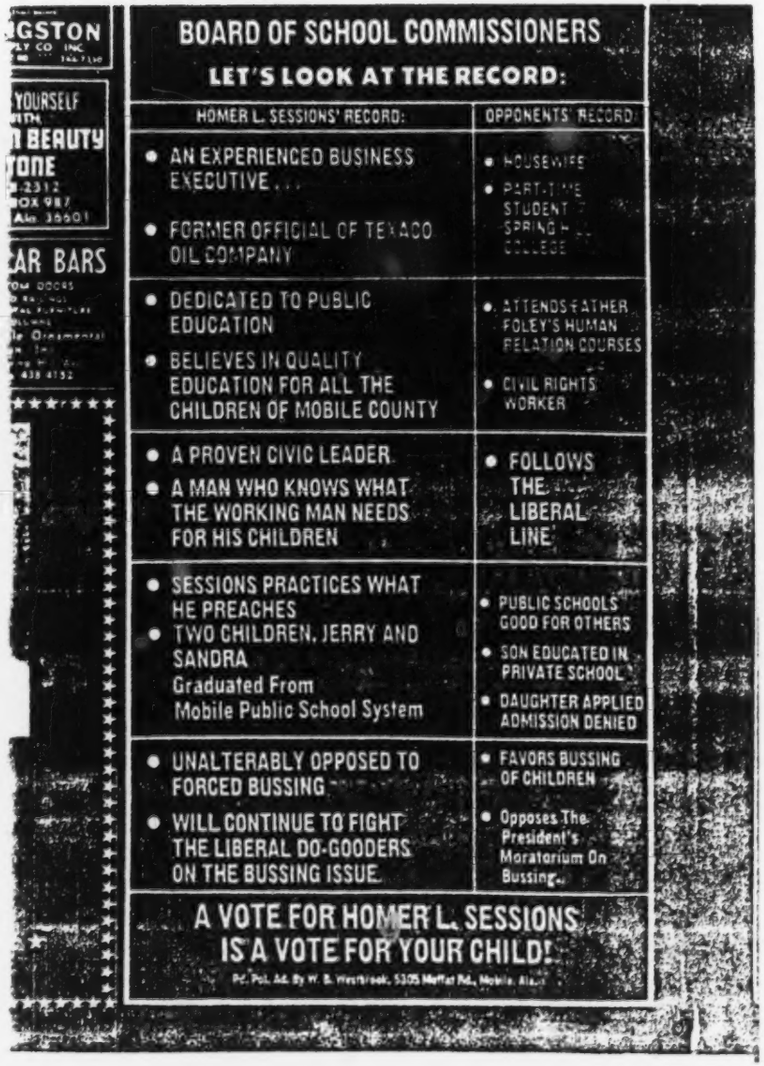
2-A Press Register
Mobile, Sunday May 28, 1972



16-A Press Register
Mobile, Monday
May 26, 1970

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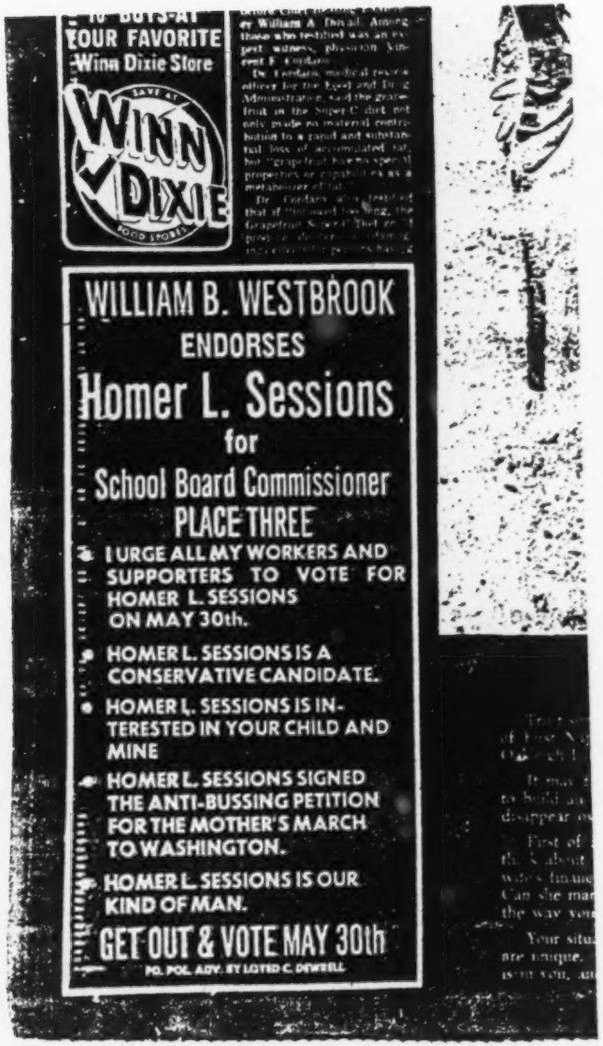
2

8



8/17/69 10-A (cont.)
BOTTOM

533a

532a

REMEMBER...it takes only a simple plurality to win.

There is no runoff!

BLACK TUESDAY
THE CHOICE IS YOURS

These people seek to destroy George Wallace and the Wallace Team

J. L. LaFlore, director of case work for the Non-Partisan Voters League and Citizens Committee, sponsor of the five- year

Bill Sellers—The State Of Politics

Mobile, Sunday, May 14, 1972 Press Register—8-A

Wallace Popularity Assessed

At a time when many people think Gov. George C. Wallace stands a chance—admittedly remote—of being elected President, many others here in Alabama feel he will have a difficult time winning another term as governor in 1974.

The latter assessment is based on some recent signs of a Wallace popularity slippage, coupled with an almost certain awareness of the issues to be developed in the next gubernatorial campaign.

The drop in popularity was perhaps best reflected when fund-raising dinners were held for the governor recently in Mobile, Birmingham and Montgomery. Several hundred tickets were sold in Mobile and about $3,000 to $7,000 was raised for the Wallace campaign, according to sources close to Rep. "Sonny" Callahan who staged the dinner.

But in Montgomery and Birmingham, the dinners were big flops.

Wallace insiders report that he is having a rough time trying to raise money in other states and is therefore having to lean heavily on Alabama for the fantastic sums needed to keep his show on the road.

Some of the Wallace fund raisers are generating some ill will with their tactics, particularly when they are dealing with contributors who do business with the state.

And there are increased murmurings of discontent over Wallace leaving state affairs neglected while he campaigns.

These complaints are not too loud at present since it is quite evident that Wallace is having an impact on the presidential campaign.

When he has returned to Alabama, however, and Washington—in the hands of a Democrat or a Republican—remains unchanged, his arguments will have a hollow ring in Alabama.

Do not think for a moment that other gubernatorial campaigners such as former Gov. Albert P. Brewer will allow voters to forget that the big issue in their 1970 race was that of full-time service as governor.

ONE TO WATCH

The most interesting race in the runoff ballot here May 30 will match Joe Langan and Harry McConnell for Place 3 on the Mobile County Commission.

Making this match-up more interesting is the bloc vote factor and the role it might play.

LANGAN

Langan received the bloc vote on May 2 and will probably have the endorsement in the runoff. It will be interesting to see if it will beat McConnell once more.

The Non-Partisan Voters League, incidentally, had 14 runoff contestants in 17 races on May 2.

U.S. Sen. Jim Al... the Wallace slate... dates for delegat... Democratic Na... tion, including... L. W. Brenna... of Mobile...

...ponent... ...an Alex... ...Johnston, ...e. The third ...Kenneth Parm... ...student from ...

Parmer is employed on a co-op program by U.S. Sen. Jim Allen. The Senator's staff expressed amazement this past week to learn that Parmer, the anti-Wallace candidate, and Parmer the Allen aide were the same.

Parmer's appointment to Allen's staff was made by the University of South Alabama.

WAS IT MONEY OR PROMISES THAT SECURED THIS BLOC VOTE?
BEAT THE BLOC! Vote and the Choice is Yours! Don't Vote and the Choice is Theirs!

BLOC VOTE or YOU?

hich Will Elect Our Next City Commissioners

PLACE 1

	BAILEY	LANGAN
3	186	907
10	28	1882
20	11	483
31	9	262
32	9	306
	243	3840

IT IS TIME TO THINK! HOW IS THE BLOC VOTE OBTAINED?

1. THE CANDIDATE MUST FAVOR INTEGRATION OF SCHOOL FACILITIES.
2. THE CANDIDATE MUST BE WILLING TO FILL A HIGH PERCENTAGE OF JOBS IN THE OFFICE HE IS SEEKING WITH NEGROES.
3. THE CANDIDATE MUST AGREE TO USE HIS INFLUENCE TO HELP INTEGRATE ALL DEPARTMENTS OF THE CITY HALL.
4. THE CANDIDATE MUST FAVOR OPEN HOUSING.
5. THE CANDIDATE MUST USE TERMS OF RESPECT WHEN ADDRESSING NEGROES.

THINK VOTERS THINK! ARE YOU GOING TO STAY AT HOME ON AUGUST 13TH AND TURN THE MULTI-MILLION DOLLAR OPERATION OF OUR SCHOOLS AND CITY OVER TO BLOC VOTE DEMANDS FOR THE NEXT FOUR YEARS?

WAS IT MONEY OR PROMISES THAT SECURED THIS BLOC VOTE?

BEAT THE BLOC! Vote and the Choice is Yours! Don't Vote and the Choice is Theirs!

PD. POL. ADV. BY CITIZENS POL. ACTION COMM., W. C. STEVENS, CHMN.

2-A - Mobile Register Monday June 3, 1968

Mader Bearing Supply

Wiglets . . . $ 8.95 and up
Wigs . . . . . 29.95 and up
DISCOUNT BEAUTY & BARBER SUPPLY

James Glenn Cobb
MUTUAL FUNDS
STOCKS — BONDS

House Please To Stop Gam

BEAT THE
BLOC VOTE
AND THE CHOICE IS YOURS
DON'T VOTE
AND THE CHOICE IS THEIRS!

Why?

—BLOC VOTE RESULTS—
FOR
LICENSE COMMISSIONER

Predominantly Negro Wards — 1, 2, 3, 10, 11, 20, 22, 23, 31, 32

THORNTON PRICE-WILLIAMS 217
ALBERT L. STURTEVANT, Jr. 2,246

THINK — THEN VOTE!

PD. POL. ADV. BY A. H. LUCIUS, MOBILE, ALA.

GRADUATING—COLLEGE—SENIORS
SPECIAL PURCHASE PLAN

LOOK

ALABAMIANS AGAINST WALLACE

DID YOU READ LOOK ARTICLE APRIL 30, 1968?

JOSEPH B. LANGAN

"A man like Wallace, who insists on fighting both the Democratic and Republican parties, is not the best man to serve Mobile's needs."

JOHN L. LEFLORE

"Wallace has no Negro support in Alabama. What is it in Wallace's soul which makes him want to boast that he has Negro support?"

"BEAT THE METRO TEAM"

BE SURE YOU

VOTE

AUGUST 19th CITY ELECTION

PAID POL. ADV. CITIZENS OPPOSED TO METRO GOV'T. R. L. McLEOD, CHR.

JOE LANGAN'S EPISTLE TO THE VOTERS OF WARD 10

"Then the voters were herded into the voting booths to be counted, the blind, the mutes, the dead, and the illitrates. And lo, 99% bore the brand of Joe Langan."

Then the FAITHFUL REJOICED. And they swarmed in the recreation center holding their Ward Tabulations aloft and crying out in a loud voice. "See how I delivered my ward." There is no Commissioner but Joe Langan and my cousin, Teddy, is his president."

The results were confirmed and the computers had ceased to compute, the politicians started forth on their pilgrimage to the Avenue... to receive the blessings of the chief politician and to pluck the sacred fruit of the tree of patronage.

But when they arrived they found Joe sitting disconsolately on a mountain of morning papers. And the music was stilled, no songs filled the air, and only the mournful howl of a few was heard in the land.

Then the ward healers drew around and questioned him saying, "Wherefore art thou sad? Thou has overwhelmed thine enemies, yea even unto 99 percent in the colored wards.

But General Joe answered them saying, "BUT WHAT OF THE 1% WHO AMONG YOU HAVING LOST A SHEEP FROM HIS FLOCK, does not leave the 99 and go in search of the one that is lost.

Then Mr. Metro spoke in the voice of thunder saying,"I shall build my cousins Great Society in which there will be no percentages, no poverty, and no vehicle inspection stations, but possibly a ZOO.

Where the humblest citizens will have the same opportunities as Mr. Bill Crane, and Mr. Floyd Pate. Where the last shall be first, and the first shall be first and all others before and after him shall be first and Mobile County shall have 50 parks, 300 fire stations, 10 thousand miles of streets, 20 libraries, 6 tunnels, and 10 airports, and we shall receive 200 million dollars in poverty funds from my cousin, Teddy. WE SHALL EMBRACE ALL MEN AND WOMEN, BLACK OR WHITE, REGARDLESS OF PREVIOUS POLITICAL AFFILIATIONS."

But the ward healers murmured against him for they feared if all partook, the Pork Barrel would soon be empty and they might be forced to help pay for the filling of it again. Then Mr. Metro knowing their thoughts, spoke to them saying, "OH, YE OF LITTLE FAITH, did I not cause the NAACP to lie down with the SILK STOCKING WARDS? Did I not convince the people of Mobile County that my TAX AND SPEND POLICY is the best way to balance the budget and not add any NEW TAXES and yet still have more PUBLIC IMPROVEMENTS. All these miracles of PROGRESS I have performed and YET YOU STILL DOUBT? COME LET US REASON TOGETHER OR ELSE!!!!

2-B Mobile Register
Monday June 3, 196

BLOC VOTE or YOU?

Which Will Elect Our Next County Commissioners?

WARD (Predominately Colored Wards)	PLACE 1 HAAS	PLACE 1 YEAGER	WARD (Predominately Colored Wards)	PLACE 2 McCONNELL	PLACE 2 SMITH
3	685	86	3	388	74
10	694	55	10	388	68
20	276	17	20	219	14
31	240	4	31	207	11
32	286	22	32	176	20
	2181	184		1378	187

WAS IT MONEY OR PROMISES THAT SECURED THIS BLOC VOTE?

BEAT THE BLOC! Vote and the Choice is Yours! Don't Vote and the Choice is Theirs!

THESE CANDIDATES SUPPORT GEORGE C. WALLACE

TAKE THIS BALLOT TO THE POLLS WITH YOU

POLLMAN'S CAKE SHOPS 438-5511

Monday May 4, 1964
Mobile Register 5-A

TO THE VOTERS

of the

1ST CONGRESSIONAL DISTRICT

[illegible] for the 1st [illegible]

[illegible] nation is the same as [illegible]

[illegible] on the floor [illegible] 88th [illegible]

We have gone too long without a voice [illegible] affairs in Washington. Now each one of us has an important role in the election tomorrow.

Throughout this campaign, I have talked and visited with as many of you as I could. I want to thank you for the support, encouragement and friendship shown to me, my family and supporters in so many ways.

Everywhere in the State and District where I have been, I have explained why the Civil Rights Bill must be defeated and why the people must support the courageous campaign of Governor Wallace. The reaction of the Wallace team was to show its appreciation and support by endorsing my candidacy, witnessed by nearly 10,000 at Hartwell Field on the night of April 27th.

The reaction of my opponents — who have repeatedly refused to take a published stand against the Civil Rights Bill — has been to shower the good people of the First District with misleading advertisement and last-minute amendments to their platforms. I thank you for disregarding desperation politics.

Let us all join together tomorrow for an overwhelming vote to win without a run-off, so we can enter the statewide affray with the full 30 days to arm ourselves with the solid support of our district. I know your vote tomorrow will reflect the confidence you have expressed in me.

The First District needs a Congressman whose voice will speak in Washington the message our Governor is carrying to the rest of the nation.

John M. Tyson

Pd. Pol. Adv. by State Senator John M. Tyson

Plaintiff #98

ANALYSIS OF VICTORY MARGINS

Year & elec.	Winner/ Leader	margin of victory total	margin of victory black wards	% for winner/leader black wards	% for winner/leader total
1960 P	Haas			42	34
	Fort			19	24
	Stevens	3,952	1,396	74	57
1960 R	Haas	9,931	1,745	80	68
	Fort	1,876	[illegible]	69	54
1964 P	Haas	21,640	2,701	82	73
	Fort	5,790	*	41	56
	Stevens	15,296	1,211	63	65
1968 P	Haas			69	30
	McConnel			41	44
	Stevens	5,207	2,642	86	56
1968 R	Yeager	16,439	*	25	70
	Smith	1,517	*	24	52
1968 G	Yeager	44,314	303	61	81
	Smith	28,257	161	55	70
	Stevens	40,321	630	70	74
1972 P	Yeager	23,418	3,112	77	78
	Smith	17,213	3,155	79	71
	McConnel			14	36
1972 R	McConnel	10,697	*	24	64
1972 G	Yeager	43,737	8,414	93	89
	Smith	15,233	7,639	86	60
	Haas	4,203	*	22	53

NOTES: P = primary; R = run-off primary; G = general election

* = blacks did not vote for winner, and thus subtracted from victory margin.

Supreme Court, U. S.
FILED
OCT 12 1978
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 78-357

==========

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN,

Appellees.

==========

On Appeal From The United States Court
Of Appeals For The Fifth Circuit

==========

MOTION TO AFFIRM

==========

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Counsel for Appellees

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MOTION TO AFFIRM

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Questions Presented

1. Were the concurrent factual findings of the courts below, that the school board at-large election plan was adopted and maintained for the purpose of discriminating against black voters, clearly erroneous?

2. Should the decision of the court of appeals be affirmed on the alternative ground that the school board's at-large election plan

had the effect of disenfranchising black voters in violation of White v. Regester, 412 U.S. 755 (1973)?

3. Did the district court err in denying the school board's request that full implementation of injunctive relief be delayed for 4 years?

ARGUMENT

1. Notwithstanding appellants' exclusive discussion of the meaning and application of the dilution rule of White v. Regester, 412 U.S. 755 (1973), the district court decision includes a finding of fact that the method of electing the Mobile school commissioners is motivated by an unconstitutional desire to discriminate against blacks. J.S. 37b. This aspect of the case, which provides a sufficient and independent basis for the relief awarded, presents an application of Gomillion v. Lightfoot, 364 U.S. 339 (1960) and Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

The district court made a finding of discriminatory intent after careful analysis of the evidence presented at a six day trial, and the court of appeals upheld the lower court findings as not clearly erroneous. J.S. 2a. This Court does not ordinarily "undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Garver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

The record contains ample evidence to support the district court finding of discriminatory intent. The district court found that preventing the election of blacks is a matter of paramount importance when the Alabama legislature considers districting legislation. J.S. 35b-36b. As a practical matter legislation affecting Mobile elections is controlled by state legislators from Mobile, J.S. 35b, who in turn are particularly responsive to local elected officials. The district court concluded that the board had acted in a dilatory and bad faith manner in trying to obstruct the instant litigation,[1/] and had a long history of intransigent racially discrimina-

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1/ J.S. 22b-26b, this finding was based on two incidents. Shortly after the action was first filed in June 1975, the legislature passed a local act reapportioning the board into five single-member districts and the defendant commissioners claimed they supported that redistricting. The district court therefore dismissed the case. Immediately after that dismissal, however, the commissioners filed suit in state court attacking the validity of the redistricting statute as violative of the state constitution. After the redistricting statute was held invalid by the state courts, the district court in March 1976 granted leave to rejoin the commissioners as defendants.

tory policies in the operation of the Mobile schools. J.S. 13b-18b, 26b, 43b.[2/] Appellants do not question any of these subsidiary findings of fact, or the district court's finding of "a present purpose to dilute the black vote." J.S. 37b.

2. Whether the discriminatory effect of the school board's at-large elections was sufficient by itself to warrant relief under White v. Regester is only an alternative ground for affirming the decision below. The district court concluded that the at-large plan had such an

---

1/ Cont'd.

In September 1976 the defendants sought without success to stay further proceedings on the ground that the commissioners were supporting new legislation which would have provided single member district elections for the Mobile school board. At trial, however, counsel for the commissioners admitted that the proposed 1976 bill, which had not been adopted, would also have violated the Alabama Constitution. J.S. 24b-26b.

2/ The district court found that the 13 year history of school desegregation litigation against the Mobile board was "replete with dilatory actions by the Board attempting to forestall implementation of a desegregated school system" and contained "devastating evidence of the complete unresponsiveness and resistance on the part of the Board to the particularized needs and aspirations of the black community". J.S. 14b.

unconstitutional impact. But it is not the practice of this Court to grant plenary review to decide the correctness of independent alternative grounds available to support otherwise proper decisions.

Most of the questions presented by appellants concern the correctness of factual findings made by the district court or the weight and sufficiency of those findings. J.S. 4-5. The district court carefully analyzed in a lengthy opinion the extensive record in this case. Each of the trial court findings was held to be not clearly erroneous by the court of appeals, and such concurrent lower court findings are not ordinarily reviewed by this Court. The record, moreover, fully supports these findings. The evidence showed that no black had ever won an election in a majority white district in Mobile, that voting patterns were so racially polarized that whites did not and would not in the foreseeable future vote for black candidates,[3/] and that white politicians manipulate candidacies to capitalize on these racial voting patterns.[4/]

3/ J.S. 10b-13b.

4/ J.S. 12b.

3. The Mobile school commissioners serve staggered six year terms; one member's term is scheduled to expire in 1978, two in 1980, and two in 1982. Although this case was filed in 1975, and despite plaintiffs' diligent efforts to obtain a decision prior to November 1976 elections, the merits were not decided by the district court until December, 1976 because of the dilatory school board tactics described in the court's opinion. J.S. 22b-26b. Under these circumstances the district court clearly had the authority to order that new elections be held in 1978 for all five commission seats[5/], the remedy which appellees sought.

Instead of directing 1978 elections in all five seats, and thus ending the terms of 4 commissioners who would ordinarily have served until 1980 and 1982, the district court ordered a far less drastic remedy. The court required merely that two commissioners be chosen in 1978 from single member districts. Since only one term was scheduled to expire in 1978, the court directed

---

5/ Sims v. Amos, 336 F.Supp. 924 (M.D. Ala. 1972); Swann v. Adams, 383 U.S. 210 (1966).

that another vacancy be created by the selection of one of the remaining four commissioners to serve as a non-voting president of the Commission. This remedial order was well within the discretion of the district court.

Appellants also complain that, because Commissioner Alexander's term expires in 1980 and there will not be an election in the district where he resides until 1982, he will lose his "right to run again as an incumbent", J.S. 23. No such right has heretofore been recognized by any court. Moreover, in this case it was impossible to assure every commissioner an opportunity to run as an incumbent, since 3 of the commissioners reside in district two, one of those terms expiries in 1980 and two of those terms end in 1982. If the district court had ordered the district two elections in 1980, thus enabling commissioner Alexander to run as an incumbent, commissioners Bosarge and Berger would have been unable to "run as incumbents" in 1982. The district court was under no obligation to adjust its order to suit the political convenience of a particular commissioner.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

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Supreme Court, U. S.
FILED
JAN 10 1979
MICHAEL RODAK, JR., CLERK

No. 78-357

IN THE

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OCTOBER TERM, 1978

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

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Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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December 1978

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-357

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Alabama, reported at 428 F. Supp. 1123, appears at pages 5a-51a of the joint appendix (J.A.). The opinion of the United States Court of Appeals for the Fifth Circuit, which is unreported, appears at pages 1a-2a of the joint appendix.

JURISDICTION

The judgment of the court of appeals, affirming a judgment of the district court in appellees' favor, was

entered on June 2, 1978. (J.A. 3a.) A notice of appeal was filed in the court of appeals on August 18, 1978. A jurisdictional statement was filed in this Court on August 30, 1978, and probable jurisdiction was noted on October 30, 1978. This Court has jurisdiction under 28 U.S.C. § 1254(2).

QUESTIONS PRESENTED

Since at least 1836 the members of the governing body of the Mobile County, Alabama, public schools have been elected by the voters of the County at large. The current state statute providing for the at-large election of the five members of the Board of School Commissioners of Mobile County was enacted in 1919, at a time when black residents of Mobile County and Alabama generally were effectively disfranchised. Not quite 35 percent of the residents of the County are black and, though there are no longer legal or extra-legal impediments to blacks' voting or otherwise engaging in the local political process, no black has been elected to the Mobile County school board in an at-large election. The questions presented are:

1. Whether criteria devised by the court of appeals, whose purported satisfaction was the basis of the judgment below that the at-large election of Mobile County school commissioners denies black citizens the equal protection of the laws in violation of the Fourteenth Amendment and denies or abridges their right to vote in violation of the Fifteenth Amendment, reflect a correct construction of those constitutional provisions, particularly insofar as governing decisions of this Court hold that state action violates them only if it is purposefully discriminatory.

2. Whether, assuming the applicability of the court of appeals' criteria in determining the constitutionality of Mobile County's system of electing its school commissioners, the courts below properly concluded that those criteria were satisfied.

3. Whether, under a proper construction of the equal protection clause of the Fourteenth Amendment and of the Fifteenth Amendment as applied to the Mobile County school board, a local municipal body, the courts below could properly have found on the record before them that the election of school commissioners by the residents of the County at large violates the Constitution when (a) there is a strong and consistent policy, racially neutral in its origin, favoring at-large elections and (b) the failure of blacks to win election to the school board proportional to their numbers is not the result of any legal or extra-legal impediments to their participation in the political process.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1. . . . [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment to the United States Constitution provides in pertinent part:

> "SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged . . . by any State on account of race, color, or previous condition of servitude."

Act No. 229 of the Local Acts of Alabama, 1919, provides in pertinent part:

> "SECTION 4. [I]n every second year . . . at the general election in that year, there shall be elected by the people successors to the members of the Class [of members of the Board of School Commissioners of Mobile County] whose term of office is then expiring. The term of office of the Commissioners elected by the people at the general elections under this Act, shall be six years."[1]

STATEMENT

The members of the governing body of the Mobile County, Alabama, public schools have been elected on an at-large basis since at least 1836. The original predecessor to the present Mobile County Board of School Commissioners was created by an act of the Alabama legislature in 1826, seven years after Alabama became a state. Acts of Alabama, 1825-26, p. 35 (J.A. 130a).[2] A later act of the Alabama legislature in 1836 expressly provided that the members of this governing body would be elected on an at-large basis by the voters of Mobile County. Acts of Alabama, 1836, p. 48 (*Id.*). Since then, the Alabama legislature has made a number of changes in the composition and responsibilities of this governing body of the

[1] The full text of Act No. 229 is included as an addendum to this brief.

[2] Citations for factual propositions are principally to the opinions of the district court and of the court of appeals, which are reproduced in the joint appendix at pages 5a-51a and 1a-2a, respectively. Other citations are to other materials included in the joint appendix in this Court (J.A.), the joint appendix below (R.) and the transcript of the trial (Tr.).

Mobile County public schools. However, during all that time and notwithstanding all of those changes, the governing state statute has provided for the at-large election of the school commissioners. Until the partial implementation of the district court's order in this case, the school commissioners have, without interruption, been elected by the voters of Mobile County on an at-large basis. (J.A. 20a, 130a-32a.)

The Complaint

The complaint in this case challenged the constitutionality of Alabama's commitment for over 140 years to the at-large election of members of the Mobile County school board. The original complaint was filed June 9, 1975, on behalf of Leila G. Brown and other black citizens of Mobile County. (J.A. 75a.) The complaint claimed that "[t]he present system of electing members of the Board of School Commissioners of Mobile County discriminates against black residents of Mobile and Prichard in that their concentrated strength is diluted and minimized by the larger white majority in other parts of the county." (J.A. 78a.) Plaintiffs requested that the court "[g]rant plaintiffs and the class they represent a declaratory judgment that the election system complained of herein violate[s] the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States and 42 U.S.C. §§ 1973, 1983 and 1985(3)." (J.A. 79a.)[3] The

[3] The district court by order dated January 17, 1976, certified that the plaintiffs could maintain the action as a class action, with the class consisting of "all black persons who are now citizens of Mobile County, Alabama." (J.A. 87a.) At that time the school commissioners were not defendants in the lawsuit, having been dismissed by an order of the district court dated November 21, 1975, after the Alabama legislature in the summer of 1975 passed an act providing for the election of school commissioners from single-member districts. (J.A. 80a.) However, in a subsequent Alabama state court action, that 1975

(footnote continued)

court was also requested to "[o]rder the reapportionment of the . . . Board of School Commissioners of Mobile County so that the voting strength of black citizens is not diluted, minimized or canceled out." (J.A. 79a.)[4]

Plaintiffs' challenge to the at-large manner of electing school board members was premised on the alleged effects of this system of election, not on its purpose. This focus was evident in plaintiffs' complaint, in an amended complaint (J.A. 90a), and in plaintiffs' contributions to a joint pretrial document setting forth the factual and legal claims of the parties (J.A. 125a-28a, 137-39a). No claim was made by plaintiffs in these documents that the at-large election system was created or was being maintained for the purpose of discriminating against black citizens.

The Defense

The school board took the position that the mere effects of the at-large manner of election, if any, in diluting black voting strength were not sufficient to make out a violation of relevant constitutional provisions. As reflected in its contributions to the parties' joint pretrial document, the school board defended the lawsuit on the ground,

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(footnote continued)
act was declared defective because of the manner in which the notice was published (J.A. 23a), and the board and its members were added as parties defendant by an order of the district court dated March 8, 1976 (R. 63).

[4] The complaint also named as defendants members of the Mobile County Commission and made allegations and requests for relief with respect to the at-large manner of electing Mobile County commissioners similar to those made with respect to the Mobile County school board. (J.A. 75a-79a.) This case was tried as one, but the district court rendered a separate opinion in the Board of School Commissioners portion of the case. (J.A. 6a n.1.) The County Commissioners portion of the case was resolved by later opinion and order of the district court dated March 2, 1977, and is not involved in this appeal.

among others, that "the present system of election was not adopted with a racially discriminatory purpose" (J.A. 133a) and that in the light of this Court's decision in *Washington* v. *Davis,* 426 U.S. 229 (1976), the at-large system of elections for school board members could not be held unconstitutional unless it "first be proven that the statute providing for the present system, when enacted, was enacted for a racially discriminatory purpose" (J.A. 136a).

The Factual Record

The trial before the district court, sitting without a jury, lasted seven days. The record showed the following:

Mobile County is in the southwest portion of Alabama, bordering on the Gulf of Mexico to the south and the State of Mississippi to the west. (J.A. 9a.) In 1970 the County had a population of 317,308 in its 1,240 square miles, of whom approximately 32.5 percent were black. (*Id.*) The City of Mobile, the largest city in the County, had a 1970 population of 190,026, with a slightly higher percentage of black residents—35.4—than the County as a whole. (*Id.*) The next largest city in Mobile County is Prichard, which by 1972 had a black majority population. (J.A. 9a, 259a.)

As stated above, the members of the governing body of the Mobile public schools have been elected at large for perhaps a century and a half. In 1826 the Alabama legislature established "The Mobile School Commissioners" to operate the first public school system in Alabama. This original act set the number of commissioners at from 13 to 25 and provided for terms of five years, to coincide with the terms of the representatives to the General Assembly of Alabama. Acts of Alabama, 1825-26, pp. 35-36.

In 1836 the Alabama legislature fixed the number of Mobile School Commissioners at 13 and reduced their term from five to three years. Acts of Alabama, 1836, p. 48. This 1836 Act also specifically provided for the election of all commissioners from the County at large by all the voters of the County, thus making explicit the manner of election of these commissioners that the district court found implicit in the 1826 Act.[5]

There has been no change in the at-large manner of electing the Mobile school commissioners since 1836, notwithstanding numerous actions by the Alabama legislature dealing with or affecting the Mobile County public school system. These actions have included (1) an 1854 Act establishing for the first time a public school system for the rest of Alabama but not substantively affecting the operations of the Mobile School Commission, Acts of Alabama, 1853-54, pp. 8, 17; (2) enactment of the Alabama Constitution of 1875, which continued recognition of the special status of the public school system in Mobile County in Section 11, Article XII, thereof; (3) an 1876 Act that reduced to six the number of Mobile County school commissioners and provided that at least two of these commissioners must reside within six miles of the County Courthouse, Acts of Alabama, 1875-76, pp. 363-64, and (4) the Alabama Constitution of 1901, which in Section 270 of Article XIV reaffirmed the special status of the Mobile public school system.

[5] There is some doubt how commissioners were to be selected under the original 1826 Act. The district court found that the 1826 Act provided for the election of the commissioners by the residents of the County at large (J.A. 20a), but the opinion of the Supreme Court of Alabama in Board of School Comm'rs v. Hahn, 246 Ala. 662, 663, 22 So.2d 91, 92 (1945), indicates that the commissioners were to be selected by the legislature. The language of the 1826 Act itself is ambiguous.

The legislation currently governing the constitution and operations of the Mobile school board was enacted in 1919. Local Acts of Alabama, 1919, p. 73. This legislation provides for five school commissioners, elected in even-numbered years for staggered six-year terms. Consistent with all previous actions by the Alabama legislature since at least 1836, the commissioners under this statute are elected at large by the County's voters.[6] In years in which two seats are up for election, candidates run for one position or the other. Elections are partisan. A state law of general applicability requires a majority vote for a party nomination, thus necessitating a runoff when no candidate obtains a majority in the initial primary vote. (J.A. 39a-40a.)

At the time that the at-large election of the governing body of the Mobile County public school system was first provided for in 1826 (or 1836) the Alabama legislature could not have been motivated by any effect this election system may have had on black voting. At this time and for many years thereafter blacks were completely removed from the political process. This point was made by Dr. Melton A. McLaurin, an associate professor of history at the University of South Alabama, who testified for plaintiffs. Dr. McLaurin testified that (1) blacks did not begin their involvement in politics in Alabama until the adoption of the Reconstruction Acts of 1867 (J.A. 194a); (2)

[6] Before the district court, plaintiffs claimed that the then-current at-large scheme was the result of either a 1933 act or a 1939 act of the Alabama legislature. Defendants asserted that the 1933 and 1939 legislative enactments were ineffective insofar as the Mobile school board is concerned because they were legislative acts of general application, and such general legislative acts cannot affect the Mobile County school system by virtue of § 270 of Art. XIV of the Constitution of 1901. (J.A. 10a.) However, the district court did not think it necessary to resolve this issue, since neither the 1933 act nor the 1939 act affected the continuing legislative judgment that Mobile County school board members should be elected at large. (J.A. 10a-11a.)

before this time, blacks were not a part of the political process in Alabama (J.A. 211a-12a); (3) before 1865 it would have been unnecessary to establish any particular method of electing Mobile County school board members to avoid black board members (J.A. 215a-16a); and (4) indeed, it would not even have occurred to the people of Mobile County during this 1826-65 period that blacks could have become members of the board (J.A. 216a, 218a).

Dr. McLaurin had a similar judgment with respect to the period from 1901, when blacks were effectively disfranchised by operation of the new Alabama constitution of that year, through at least 1944. (J.A. 195a-98a.) Dr. McLaurin specifically testified that during this period (1) blacks were essentially eliminated from participation in the political life of Mobile County and Alabama generally (J.A. 198a, 214a-15a); (2) blacks were effectively prevented from being elected to the school board in Mobile by this overall system (J.A. 215a); (3) it would have been unnecessary to adopt any particular election system to prevent blacks from being elected to the school board (*id.*); and (4) even the possibility that blacks might be able to vote in the future would not have been a major motivating factor in any legislative actions (J.A. 219a).

This deplorable history of disfranchisement of blacks, by no means unique to Mobile or to Alabama, is today just that—history—in Mobile. There are no legal or extra-legal barriers preventing blacks from freely voting and fully participating in the political process in Mobile County, including the process of electing members of the Mobile school board. Thus, as the district court expressly found, "[a]ny person interested in running for school commissioner is able to do so" (J.A. 36a), and "blacks register and vote without hindrance" (J.A. 12a). The school board elections are partisan, and "both black[s] and whites participate in both parties." (*Id.*)

The record clearly shows that there is no white-oriented slating organization that effectively controls access to the nomination process. (J.A. 247a, 296a; Tr. 495, 500.) In fact, the only voting organization with any substantial political influence in Mobile County is the Non-Partisan Voters League, a local organization affiliated with the National Association for the Advancement of Colored People. (J.A. 329a, 408a-09a, 411a; Tr. 702.) The Non-Partisan Voters League is considered "the single most effective endorsing organization" in Mobile County and "the most cohesive and most effective voter organization" in the County. (J.A. 315a.) There is no white-oriented organization comparable to or as effective as the Non-Partisan Voters League. (J.A. 247a, 330a-31a; Tr. 494-95, 612.)

The nature of election campaigns for the Mobile County school board is influenced by the small size of the electorate and the fact that, until very recently, school commissioners served without salary. (J.A. 306a; Tr. 618.)[7] Accordingly, school board election efforts are relatively inexpensive—estimated at $2,000 to $5,000 (J.A. 331a, 343a, 413a)—and largely involve efforts to generate candidate name recognition among the voters (J.A. 414a-15a; Tr. 1320-21). A common pattern is that a candidate for commissioner fails of election the first time he or she runs but is elected in a subsequent effort. (J.A. 414a-15a.)

Particularly in view of the large and growing proportion of black voters—estimated at 24 percent of the voters casting ballots in the 1976 Mobile County primary elections (J.A. 9a)—there have been increasing efforts by

[7] Under a recently enacted state statute, school commissioners are now paid $50 a meeting and are reimbursed up to $300 a month for their expenses.

school board candidates actively to solicit black support. Both black and white political leaders testified that support from black voters was often significant to success, particularly in view of the effectiveness of the Non-Partisan Voters League, and that both black and white candidates solicit black votes and campaign actively in black as well as white areas.[8]

---

[8] Representative Cain J. Kennedy, a black and one of Mobile County's members of the Alabama House of Representatives, testified:

> "Q: What about the white politicians who do run in these county-wide elections. Do they solicit the votes of the black citizens?
>
> "A: I think they solicit the votes of the black citizens. Some campaign in the community. Some don't.
>
> "Q: How do they go about it?
>
> "A: It has been my experience that, of course, some of the white politicians come into the community and get to know the people in the community and talk about the problems in the community.
>
> "Again, some of the others contact key black people in the community, those people who have some kind of influence, and try to get votes that way." (J.A. 231a.)

Representative Gary Cooper, another black representative from Mobile County, who was active in his brother's successful 1974 race for Mayor of Prichard, testified:

> "Q: With respect to the white candidates that—whose campaigns you were involved in, would you tell us whether or not they sought the vote of the black community throughout Mobile County or throughout the City of Mobile?
>
> "A: Yes, sir, they did." (J.A. 259a.)

Mr. Robert Edington, a white political leader who had served in the Alabama Senate and House and who testified for plaintiffs, also explained that most white candidates make a "strong overture" to the black community:

> "Q: . . . [M]ost white candidates do attempt to get black votes in their campaigns, don't they?
>
> "A: Obviously they make every effort to get all the votes they can. They do, of course, make a strong overture to the black community, generally the leadership of the black community." (J.A. 304a.)

(footnote continued)

There was evidence that did indicate that a candidate's race is an important factor in Mobile County elections, including elections to the school board. (J.A. 228a.) There was also evidence of racially polarized voting, *i.e.*, whites voting for a white and blacks for a black when there is a head-to-head contest. (J.A. 256a.) Although four black candidates had campaigned for the school board between 1962 and 1974 and had reached the primary run-offs—in each case doing so in their first bid for elective office (Tr. 533-34)—none of these candidates was successful. (J.A. 12a-13a.)

There was also testimony that the black electorate has played an important "pivotal" or "swing vote" role in a number of school board and other Mobile County at-large elections. (J.A. 392a-93a, 410a-11a; Tr. 1327.) As John H. Friend, a professional economic and political consultant, testified, this fact came as "no surprise"; Mobile County candidates "are very much aware . . . that the black vote counts." (J.A. 395a.) As one example, Mr. Friend's analysis showed that the dominant black wards in Mobile had supported the winning candidate in 19 of the 27 at-large County commission races since 1960. (J.A. 389a.)

(footnote continued)

Senator Meyer Perloff, a white politician who narrowly won election to the Alabama Senate from Mobile County in an at-large run-off election against a black candidate in 1974 (winning by 389 votes), also testified to his campaign efforts in black and white areas of the County. (Tr. 1001-04.)

Representative James E. Buskey, a black representative to the House of Representatives elected in 1976, testified that in his 1974 campaign against Senator Perloff he also covered all areas that were heavily populated "and that included both black and white communities." (J.A. 351a.)

Mrs. Lonia M. Gill, a black candidate for the school board who reached the run-off election in 1974, testified that she campaigned "in communities, period. I contacted people. I didn't go out expecting blacks to elect me. I went to contact people." (Tr. 680.)

The District Court's Findings and Conclusions

The district court's consideration of the record was shaped by its understanding that the "controlling law" of the Fifth Circuit was provided by the decision of the court of appeals in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd per curiam on other grounds sub nom. East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976). (J.A. 36a.) *Zimmer* sets forth four "primary" and several additional "enhancing" factors that district courts are directed to consider in determining whether an at-large election system has unconstitutionally "diluted" the black vote. These factors governed the district court's decision.

The first of the so-called *Zimmer* factors considered by the district court was "the openness [to blacks] in the slating process or candidate selection process." (J.A. 36a.) The court found that "blacks register and vote without hindrance," that "black[s] and whites participate in both parties" and that "[a]ny person interested in running for school commissioner is able to do so." (J.A. 12a.) The court went on to say that the "system at first blush appears to be neutral, but consideration of facts beneath the surface demonstrates the *effects* which lead the court to conclude otherwise." (J.A. 37a; emphasis in original.) Noting the four unsuccessful campaigns by blacks for school board positions, the court cited evidence that black politicians now "shy away" from County at-large elections, principally in the court's view because of "the polarization of the white and black vote." *(Id.)* Without any further explanation, the district court stated its conclusion that there is "a lack of openness to blacks in the political process in the school commissioners' election." (*Id.*)

The second *Zimmer* factor considered by the district court was the "unresponsiveness of the elected school

commissioners to the black minority." Here the district court was impressed by what it characterized as "dilatory actions" in a separate lawsuit seeking to bring about the desegregation of the school system. (*Id.*) The district court also said that the board "cannot justly claim credit for the improvement of the school system today, since they are operating under the watchful eye of the court . . . ." (J.A. 37a-38a.) The court, without reference to any specific instances of a failure to serve the interests of black citizens or voters or school children, concluded that "the countywide elected school commissioners as practiced in Mobile County has not [been], and is not, responsive to blacks on an equal basis with whites; hence there exists racial discrimination." (J.A. 37a.)

The third primary *Zimmer* factor considered by the district court was the existence of "a tenuous state policy showing a preference for at-large districts." This factor was considered briefly in the "Findings of Fact" section of the district court's opinion and in a two-sentence paragraph in its "Conclusions of Law" section. The latter read:

> "The Alabama legislature has offered little evidence of a preference one way or the other for multi-member or at-large districts in its counties. This court finds state policy regarding multi-member at-large districting as neutral." (J.A. 38a.)

The district court did not explain how this conclusion was consistent with its earlier factual findings that the Mobile County school commissioners have been elected on an at-large basis continuously since 1826 and that the "manifest policy of Mobile County has been to have at-large or multi member districting." (J.A. 20a.)

The fourth *Zimmer* factor considered by the district court was whether "past racial discrimination in general

precludes the effective participation [by the minority] in the election system." The district court concluded that the existence of such past discrimination "has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners" (J.A. 21a), but this conclusion appears merely to reflect the significance placed by the district court on its finding of "racial polarization" in these elections. No other explanation is given of how any "past discrimination" did or could affect black participation in the election process.

The district court also found that the "enhancing" factors cited in *Zimmer* were generally present in the case of the at-large election of members of the Mobile school board. These "enhancing factors" include "the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographic subdistricts." (J.A. 36a.)

After separately considering each of the *Zimmer* factors the district court found that the plaintiffs had met their burden "by showing an aggregate of the factors catalogued in *Zimmer.*" (J.A. 41a.) On this basis the district court concluded that the at-large election of Mobile County school commissioners "results in an unconstitutional dilution of black voting strength." (*Id.*)

Before reaching this result, the court considered "defendants' contention that *Washington* [*v. Davis,* 426 U.S. 229 (1976),] makes it clear that to prevail the plaintiffs must prove that the statute establishing the at-large elections was adopted with a discriminatory *purpose.*" (J.A. 26a; emphasis in original.) The district court concluded that the "new Supreme Court purpose test" that it perceived in *Washington* did *not* apply to this case. The district court reached this result after characterizing

the Court's earlier holding in *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), as "if in a particular case the [at-large election] system *operates* to minimize or cancel out the voting strength of racial or political elements, the courts can alter the structure." (J.A. 28a; emphasis added.) The district court reasoned that the failure of the Court in *Washington* to cite *Whitcomb* or other cases in this area "leads this court to the conclusion that *Washington* did not overrule these cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination." (J.A. 34a; emphasis in original.)[9]

The Remedy

Having concluded that plaintiffs had demonstrated the unconstitutionality of the at-large election system according to the *Zimmer* criteria, the court then proceeded to fashion a remedy to include "small, single member districts" that "will provide blacks a realistic opportunity to elect blacks to the Board of School Commissioners." (J.A. 42a.) The district court adopted a districting plan submitted by plaintiffs, which created five separate districts with weighted average black populations of 13.9 percent (District 1), 11.7 percent (District 2), 61.0 percent (District 3), 56.8 percent (District 4), and 11.2 percent (District 5). (J.A. 43a, 51a.) The district court also concluded that representatives from the two predominantly black districts, Districts 3 and 4, should be elected in 1978, notwithstanding the fact that only one

[9] The district court also considered plaintiffs' claim that the required "purpose" or "intent" could be found on the facts before it based on a "tort standard" premised on the claim that the dilution of black voting in Mobile County was "a natural and foreseeable consequence" of the 1919 Act under which school commissioners are elected. (J.A. 30a-33a.) However, the district court expressly declined "to base its decision on this theory." (J.A. 33a.)

commissioner's term expired in 1978 — by coincidence that of a commissioner residing in District 4. (J.A. 44a.) The result of this decision was to create a board of six members following the 1978 elections until the next elections scheduled in 1980. To deal with the possibility of a tie vote, which the court said might render the board "ineffective," the court ordered that one of two named commissioners whose terms expire in 1980 be elected chairman of the board with no right to vote except in the event of a tie. (J.A. 46a-47a.)[10]

The Court of Appeals' Decision

The court of appeals (Goldberg, Ainsworth, Hill, JJ.) affirmed the judgment of the district court in a summary two-page opinion following consideration of the appeal on its summary calendar, without argument, pursuant to the court's Local Rule 18. (J.A. 1a-2a.) The court of appeals concluded that the district court "has applied the proper

[10] The court ordered that election of the non-voting chairman take place one month prior to the general election of November 7, 1978. However, the board members could not agree on a chairman, and three members of the board were held in contempt by the district court. The effect of orders issued by Mr. Justice Powell dated October 27 and October 31, 1978, was to stay this civil contempt order but to permit the elections under the new districting plan ordered by the district court. Justice Powell's order dated October 31, 1978, also provided that "with respect to the selection of a chairman of the school board, the District Court may take such other action consistent with this order as it deems appropriate."

Elections pursuant to the district court's earlier order were held November 7, 1978, and the newly elected board members were sworn in on November 15, 1978. Following a hearing on November 14, 1978, the district court entered an order dated November 24, 1978, specifically designating the board members who were to serve successively as non-voting chairman of the board and further enjoining the existing members of the board from "dismissing the appeal and petitions previously filed in this action in the Supreme Court of the United States."

standards for evaluating plaintiffs' contention that the election of school commissioners on an at-large basis dilutes the votes of black citizens," and that "the District Court's findings are not clearly erroneous and that these findings amply support the conclusion that Mobile County's at-large election system unconstitutionally depreciates the value of the black vote. *See Bolden* v. *City of Mobile,* 571 F.2d 238 (5th Cir. 1978)."[11]

SUMMARY OF ARGUMENT

I

The judgment below is predicated on the satisfaction of criteria for the invalidation of multi-member at-large electoral schemes enunciated by a majority of the court of appeals in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973) (*en banc*), an opinion whose authority as constitutional law this Court declined to endorse in affirming the judgment on other grounds in *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976). The district court applied the so-called *Zimmer* factors in the belief that, even after this Court's decisions in *Washington* v. *Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977), it was sufficient for the plaintiffs to show that the at-large method of electing Mobile County school commissioners resulted in "an unconstitutional dilution of

[11] The reference to *Bolden* was to the decision by a differently constituted panel of the court of appeals on an appeal by the City of Mobile from a decision by Judge Pittman—who also decided the instant case in the district court—that the City's commission form of government, which included at-large election of the three Mobile city commissioners, was unconstitutional. The City of Mobile's case was tried several weeks before this case. This Court noted probable jurisdiction of an appeal by the City of Mobile from the judgment of the court of appeals on October 2, 1978, No. 77-1844, and the City's case is to be heard in tandem with this case.

black voting strength," without regard to any discriminatory purpose. The court of appeals disagrees with this view but affirmed nevertheless, evidently on the ground that findings under the *Zimmer* factors supply the requisite discriminatory purpose.

Both the district court's view and that of the court of appeals are inconsistent with this Court's interpretation of the equal protection clause of the Fourteenth Amendment and of the Fifteenth Amendment. The district court was wrong in thinking that voting power dilution cases are not governed by the teaching of *Washington* v. *Davis* and *Arlington Heights* that a state denies the equal protection of the laws only when it engages in purposeful or intentional discrimination. The Fifteenth Amendment, similarly, is violated only if the State has deliberately contrived to deny or abridge the right to vote on account of race, color or previous condition of servitude.

Further, contrary to the judgment of the court of appeals, an affirmative finding under *Zimmer* cannot be made to supply the requisite purpose or intent. The *Zimmer* factors were devised in a case manifestly premised on the view then current that effects and not purpose were decisive. More fundamentally, the *Zimmer* factors provide no basis for inferring a discriminatory intent or purpose either at the inception of an at-large voting system or in its continuation. The court of appeals' effort to transmute the *Zimmer* factors into such a showing amounts, in substance, to the district court's erroneous assertion that the satisfaction of the *Zimmer* criteria suffices without more. That result is inconsistent with *Washington* v. *Davis* and *Arlington Heights* and with the course of decision under the Fourteenth and Fifteenth Amendments.

II

Even if it is assumed, *arguendo,* that the *Zimmer* factors were proper guides to decision, a proper analysis of these factors does not support the conclusion reached below that the at-large election of Mobile County school commissioners unconstitutionally "dilutes" black voting strength. The beginning point in any such analysis is a situation in which, because of racially polarized voting, minority candidates are not elected in at-large elections in proportion to the minority population. But this is only the starting point. The Constitution does not guarantee minority groups proportional representation. *E.g., Beer* v. *United States,* 430 U.S. 130, 136 n.8 (1976); *White* v. *Regester,* 412 U.S. 755, 765-66 (1973); *Whitcomb* v. *Chavis,* 403 U.S. 124, 149 (1971). There is no constitutional wrong even if the lack of proportional representation results from the "unfortunate practice" of "voting for or against a candidate because of his race . . . ." *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 166-67 (1977).

Even under the *Zimmer* criteria there must be showings (1) that the minority lacks access to the candidate slating process, (2) that officials elected at large have been "unresponsive" to minority needs, (3) that the state has no more than a "tenuous" policy underlying the at-large system of elections, and (4) that the lingering effects of past discrimination preclude effective minority participation in the political process. The district court's affirmative findings on each of these four factors were fatally flawed, for various reasons.

The district court's findings on the first and fourth factors—involving access to the political process—incorrectly relied solely on the effect of polarized

voting, which is properly only the beginning point of the analysis. Properly construed the district court's basic findings on these two factors support the school board's position, not that of plaintiffs.

The court's findings as to the second factor—the "unresponsiveness" of the elected school board officials —erroneously relied on the school board's separate litigation over school desegregation, not on any judgment that the board is not currently responsive to the needs of black citizens or black parents or black school children.

Finally, and perhaps most seriously, in resolving the third factor—the force of the state's policy underlying the at-large elections—the court improperly gave no weight to Alabama's long-term, century-and-a-half commitment to the at-large manner of electing Mobile County school commissioners.

III

If proper constitutional principles are applied, as expounded in *Whitcomb* v. *Chavis* and *White* v. *Regester,* the plaintiffs have not proved any constitutional infirmity in the at-large manner of electing the Mobile County school commissioners. Plaintiffs in a case such as this must prove either (1) that the state's decision to provide for at-large elections was a racially motivated effort to submerge minority voting or (2) that a minority has been deliberately excluded from the political processes, which exclusion can be remedied by the replacement of the at-large system with separate districts in some of which minority voters will preponderate.

For reasons already indicated, the state's judgment to provide for at-large elections for the Mobile County school

board was without racial motivation, and blacks are plainly not excluded from the Mobile County political process. Further, in passing on the possible constitutionality of at-large voting systems for local governmental units—an issue not previously resolved by this Court, as noted in the special concurring opinion of four Justices in *Wise* v. *Lipscomb,* 98 S.Ct. 2493, 2502 (1978)—reviewing courts should be especially sensitive to the unique problems of local government bodies and to the needs of local groups, such as school boards, to administer the affairs of the community with an area-wide view (a goal promoted by the use of at-large elections).

ARGUMENT

I. THE CRITERIA BY WHICH THE CONSTITUTIONALITY OF THE MOBILE COUNTY SCHOOL BOARD'S AT-LARGE ELECTIONS WAS JUDGED ARE INCONSISTENT WITH DECISIONS OF THIS COURT CONSTRUING THE FOURTEENTH AND FIFTEENTH AMENDMENTS, PARTICULARLY AS THOSE DECISIONS REQUIRE A SHOWING OF AN INTENTION OR PURPOSE TO DISCRIMINATE.

The judgment below that the at-large election of the Mobile County school commissioners violates the Fourteenth and Fifteenth Amendments rests upon the purported satisfaction of criteria drawn from the majority opinion of the court of appeals sitting *en banc* in *Zimmer* v. *McKeithen,* 485 F.2d 1297 (5th Cir. 1973), an opinion that this Court went out of its way not to endorse when it affirmed the judgment on other grounds in *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976) (*per curiam*).

The district court held that plaintiffs had shown, by reference to the so-called *Zimmer* factors, that the effect of the at-large election system was "an unconstitutional dilution of black voting strength" and that, to prevail on their constitutional claim, they need not go further and demonstrate purposeful discrimination.

In similar, contemporaneous litigation, including a companion case involving the city government of Mobile, the court of appeals disagreed with the district court on the latter point but held that satisfaction of the *Zimmer* criteria demonstrated the requisite discriminatory intent. A different panel of the court affirmed the district court judgment in this case with a citation to the court's decision in the *City of Mobile* case.

In this section of our argument we shall demonstrate that the district court erred in its view that the Fourteenth and Fifteenth Amendments require no showing of a discriminatory purpose in voting power dilution cases, and that the court of appeals, correct on that point, is wrong in its view that the satisfaction of its *Zimmer* criteria supplies the requisite discriminatory purpose.

We lay the background for that argument with a discussion of the *Zimmer* opinion, which, as glossed itself by *Bolden* v. *City of Mobile,* 571 F.2d 238 (5th Cir. 1978), *prob. juris. noted,* No. 77-1844, and companion cases,[12] states the law of unconstitutional voting power dilution applied in the Fifth Circuit. The *Zimmer* litigation was an outgrowth of a lawsuit claiming that population disparities between wards used for electing members of the police jury and of the school board in rural East Carroll Parish,

[12] Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), *petition for cert. filed,* No. 78-492, Sept. 22, 1978; Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Thomasville Branch, NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978).

Louisiana, violated the "one-man, one-vote" principle. *Zimmer* v. *McKeithen, supra* at 1301. The district court adopted a reapportionment plan proposed by the East Carroll police jury that provided for the first time for at-large Parish elections for both the police jury and the school board. Such at-large elections were held in 1969 and 1970, but in 1971 the district court, on its own motion, ordered the submission of plans revised in the light of the 1970 census results. *Id.*

At this point a black resident and voter of East Carroll Parish was permitted to intervene to claim that this at-large election scheme violated the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. *Id.* The intervenor claimed that the shift to at-large elections invidiously discriminated against blacks, who in 1971 constituted 58.7 percent of the Parish's population but only 46 percent of its registered voters, allegedly because of past racial discrimination in voting procedures; from 1922 to 1962 no black resident of the Parish had been permitted to register to vote. *Id.* at 1301, 1304.

The district court upheld the proposed plan as against intervenor's constitutional and other challenges, and a panel of the court of appeals affirmed. *Zimmer* v. *McKeithen,* 467 F.2d 1381 (5th Cir. 1972). However, by a divided vote (9-6) the court of appeals sitting *en banc* reversed.

The majority's analysis was manifestly premised on its view that plaintiff's perceived constitutional right of "fair representation" was abridged either (1) if there was a deliberate racially motivated gerrymander or (2) if the effect of an at-large election scheme was " 'to minimize or cancel out the voting strength of racial or political elements of the voting population,' " without regard to

whether the scheme was "racially motivated" or "drawn along racial lines." *Zimmer* v. *McKeithen,* 485 F.2d at 1304 (citation omitted).

The court made it as clear as words could that its holding was based on a finding that plaintiff had met his burden under the *second* alternative, and that it had not even considered plaintiff's contention under the first:

> "In view of our holding that Marshall satisfied the burden with respect to the second standard, we need not entertain his contention that the departure from the firmly entrenched state policy against at-large voting in elections in police juries and school boards comes within the first standard." *Id.* (footnote omitted).

The court then identified the precise factors — subsequently to be referred to as the *Zimmer* factors — that it believed would support a finding under this second alternative:

> "[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts." *Id.* at 1305 (footnotes omitted).

The court of appeals then stated that "[t]he fact of dilution is established upon proof of the existence of an aggregate of these factors," with the caveat that "all these factors need not be proved in order to obtain relief." *Id.*

This Court affirmed the result reached by the court of appeals in *Zimmer* in a *per curiam* opinion. *East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636 (1976). It did so solely on the ground that the district court had improperly ignored the rule of *Connor* v. *Johnson,* 402 U.S. 690 (1971), that single-member districts are to be preferred when a court comes to fashion a remedy for malapportionment. The Court expressly stated that its affirmance was "without approval of the constitutional views expressed by the Court of Appeals," characterizing those views as follows:

> "Relying upon *White* v. *Regester,* 412 U.S. 755 (1973), [the Court of Appeals] . . . seemingly held that multimember districts were unconstitutional, unless their use would afford a minority greater opportunity for political participation, or unless the use of single-member districts would infringe protected rights." *East Carroll Parish School Board* v. *Marshall, supra* at 638.

Despite the cloud thus cast on the authority of *Zimmer* for anything more than what the remedy should be for a case of malapportionment, the court of appeals has instructed all of its district courts that in voting power dilution cases the so-called *Zimmer* factors govern the decision. *E.g., Blacks United for Lasting Leadership, Inc.* v. *City of Shreveport,* 571 F.2d 248, 250 (5th Cir. 1978) ("The *en banc* court in *Zimmer* synthesized the dilution principles of *Regester* and *Chavis* by establishing certain criteria that a district court must address in deciding a dilution case.") In concept and in practice, the rule that arises from

application of the *Zimmer* factors establishes the presumptive invalidity of at-large voting systems throughout the southern states. As we shall show, such a rule is at odds with applicable constitutional principles.

A. Neither The Equal Protection Clause Of The Fourteenth Amendment Nor The Fifteenth Amendment Is Violated In The Absence Of A Showing That An Electoral System Such As An At-Large System Of Elections Was Motivated By Purposeful Discrimination.

1. In so-called voting power dilution cases, as in all others, a state denies the equal protection of the laws only if it discriminates purposefully.

Zimmer and the opinions of this Court on which the *en banc* majority there drew came before *Washington* v. *Davis,* 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 (1977). These latter cases laid to rest any doubt there might have been that a state does not deny to any person within its jurisdiction the equal protection of the laws within the meaning of the Fourteenth Amendment unless it discriminates purposefully against that person or a group of which he or she is a member.

Though the doctrine of these cases was by no means novel—the requirement of an "intentional or purposeful discrimination" in equal protection cases was stated at least as long ago as *Snowden* v. *Hughes,* 321 U.S. 1, 8 (1944)—the Court in *Washington* v. *Davis* recognized that there had been "indications to the contrary" in recent opinions such as *Palmer* v. *Thompson,* 403 U.S. 217 (1971), and *Wright* v. *Council of City of Emporia,* 407 U.S. 451 (1972). 426 U.S. at 242-44. It is not surprising therefore that dicta seeming not to distinguish "purpose"

from "effect" or "designedly" from "otherwise" in equal protection analysis should have been found in the opinions of the Court, including those that were relied upon in *Zimmer.*[13]

In other areas of equal protection jurisprudence, lower courts had also been bemused by these "indications to the contrary."[14] But in those and other areas it is now recognized that the equal protection clause does not invalidate a state action or enactment simply because the action or enactment has a disproportionate impact on a particular racial or other group.[15] Voting power dilution cases logically stand no differently.

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[13] The key phrase in *Zimmer* is that plaintiffs may make out a case by proving that " 'designedly or otherwise' " an electoral scheme operates to minimize or cancel out the voting strength of racial or political elements of the population. 485 F.2d at 1304. This language was first used by this Court in Fortson v. Dorsey, 379 U.S. 433, 439 (1965), and was repeated in Burns v. Richardson, 384 U.S. 73, 88 (1966). In *Fortson,* where the Court rejected a challenge to multi-member districts, the Court said that, if it were ever demonstrated that "designedly or otherwise" such a minimization or cancelling out of voting strength occurred as a result of multi-member districts, "it will be time enough to consider whether the system still passes constitutional muster." 379 U.S. at 439. Again in *Burns,* the Court approved the multi-member districts that were at issue. It is notable that the "designedly or otherwise" phrase was dropped from the formulation when the Court actually considered the issue in the two voting power dilution cases it has decided, Whitcomb v. Chavis, 403 U.S. 124, 143 (1971), and White v. Regester, 412 U.S. 755, 765 (1973).

[14] *E.g.,* Norwalk CORE v. Norwalk Redev. Agency, 395 F.2d 920 (2d Cir. 1968) (urban renewal); Kennedy Park Holmes Ass'n v. City of Lackawanna, 436 F.2d 108 (2d Cir. 1970), *cert. denied,* 401 U.S. 1010 (1971) (zoning).

[15] *E.g.,* Resident Advisory Bd. v. Rizzo, 564 F.2d 126 (3d Cir. 1977) (public housing); Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (zoning); Dayton Bd. of Ed. v. Brinkman, 433 U.S. 406 (1977) (school desegregation); Casteneda v. Partida, 430 U.S. 482 (1977) (jury selection).

The intent doctrine of *Washington* v. *Davis* and *Arlington Heights* has its impact when a challenged state statute or action is, as in this case, neutral on its face. In the case where the discrimination appears on the face of the state enactment—where for example, state law requires racially separate schools or facilities or provides that certain election districts shall elect more representatives than other districts with a comparable or greater population—there is no need to examine the state's purpose in enacting the law to assess whether it is action by the State that may be said to have denied to any person the "equal protection of the laws." In such cases, it is clear from the statute itself that state action has created the unequal treatment. However, when the state action is neutral on its face—involving for example, the drawing of an election district boundary or a decision to provide for elections on an at-large basis—proof of a "discriminatory purpose" is essential to a showing that it is action by the *State* that is responsible for any "invidious discrimination" that has resulted. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp., supra* at 270-71 n.21; *Whitcomb* v. *Chavis, supra* at 154-55; *Keyes* v. *School District No. 1,* 413 U.S. 189, 255-56 (1973) (Rehnquist, J., dissenting).

There is, we submit, no real doubt that the "purposeful discrimination" requirement articulated by the Court in *Washington* v. *Davis* and *Arlington Heights* applies with full force to plaintiffs' claim that the at-large election of Mobile County school board members constitutes a denial of their rights under the equal protection clause. The Court's statement in *Arlington Heights* that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause," 429 U.S. at 265, was emphatic and unqualified. Further, both in *Arlington Heights* and in *Washington* v. *Davis,* the Court specifically cited as support for this view its earlier decision in *Wright* v. *Rockefeller,* 376 U.S. 52 (1964), an election districting case that raises considerations in the "racial gerrymandering" area directly analogous to those involved in a claim that an at-large districting plan unconstitutionally discriminates against black residents. 429 U.S. at 265; 426 U.S. at 240.

Mr. Justice Stewart stated the point matter-of-factly in his concurring opinion in *United Jewish Organizations v. Carey,* 430 U.S. 144, 179-80 (1977), in which Mr. Justice Powell joined. That was a case in which, as Justice Stewart put it, the question presented was "whether New York's use of racial criteria in redistricting Kings County violated the Fourteenth or Fifteenth Amendment." "Under the Fourteenth Amendment," the Justice said, "the question is whether the reapportionment plan represents purposeful discrimination against white voters," citing *Washington* v. *Davis.* He added that "[d]isproportionate impact may afford some evidence that an invidious purpose was present," citing *Arlington Heights,* but he concluded that, even in the circumstances of a statute that professedly was drawn with an awareness of race, New York had not "acted with the invidious purpose of discriminating against white voters."

The court of appeals therefore was clearly right in concluding in the City of Mobile's case and its companions that the equal protection clause requires a showing of purposeful discrimination in voting power dilution cases. *See, e.g., Nevett* v. *Sides,* 571 F.2d 209, 217-19 (5th Cir. 1978).

That leaves the district court below, which concluded in this case as it did in the City of Mobile's case that the requirement of a showing of a "discriminatory purpose" does not apply to a claim of unconstitutional dilution of

minority voting power. Apparently, the court's judgment was based upon (1) its reading of this Court's opinions in so-called "voter dilution" cases as not requiring a showing of such a "discriminatory purpose" and (2) its conclusion that, since this Court in *Washington* v. *Davis* did not specifically cite these "voter dilution" cases, *Washington* did not "overrule these cases" or "establish a new Supreme Court purpose test" applicable to such cases. (J.A. 28a, 34a.)

That the district court was wrong in its view of this Court's decisions will be demonstrated below. (See pp. 56-60, *infra.)* Because *Whitcomb* v. *Chavis,* 403 U.S. 124 (1971), and *White* v. *Regester,* 412 U.S. 755 (1973), are fully consonant with *Washington* v. *Davis* and *Arlington Heights,* this Court had no special need to cite the earlier decisions, much less to "overrule" them.

2. As the court of appeals has concluded, a showing of a "discriminatory intent" is also required to support a claim founded on the Fifteenth Amendment.

The court of appeals was also clearly correct in concluding, in the City of Mobile's case and its companions, that racially discriminatory motivation or intent is a requisite under the Fifteenth Amendment as well as the Fourteenth.

The question was not considered in either opinion below but was resolved by the court of appeals in *Nevett* v. *Sides,* 571 F.2d 209 (5th Cir. 1978), *petition for cert. filed,* No. 78-492, Sept. 22, 1978, in language adopted by reference in *Bolden* v. *City of Mobile,* 571 F.2d 238, 241 (5th Cir. 1978), *prob. juris. noted,* No. 77-1844, which in turn was cited for the summary affirmance in this case.

In *Nevett* the court of appeals held that a finding of invidious racial motivation is a necessary element of any

successful claim that an at-large election scheme violates the Fifteenth Amendment. 571 F.2d at 220-21. Its analysis appears irrefutable.

First, the court found that, "[b]road though the reach of the [fifteenth] amendment may be, it has been invoked successfully only in cases founded on acts of intentional racial discrimination." *Id.* at 220. The court noted that "[t]he necessary motivation was painfully apparent in the early cases striking down the exclusion of blacks from party primaries, . . . the grandfather clause, . . . and the invidious administration of literacy tests . . . ." *Id.*[16] And it said that "racially discriminatory motivations were unmistakably present" in *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), this Court's highly relevant racial gerrymander precedent. *Id.* at 220-21. These cases "illustrate what is apparent on the face of the amendment: a showing of racially motivated official action that infringes the right to vote is sufficient to state a cause of action." *Id.* at 221.

If racial motivation is sufficient to state a claim, is it necessary? The court found an affirmative answer dictated by *Wright* v. *Rockefeller,* 376 U.S. 52 (1964). The court noted that the plaintiff in *Wright* claimed under the Fifteenth Amendment as well as the Fourteenth and reasoned that the holding in *Wright* that "a showing of intentional discrimination was essential to a valid claim . . . implies as a matter of logic that such a demonstration is necessary under both fourteenth and fifteenth amendments." 571 F.2d at 221. As the court noted and as we have pointed out, *Wright* v. *Rockefeller* was treated as

[16] Citing, respectively, Terry v. Adams, 345 U.S. 461, 463-65 (1953); Guinn v. United States, 238 U.S. 347, 364-66 (1915); and Louisiana v. United States, 380 U.S. 145, 151-53 (1965).

exemplary of the intent requirement of the Fourteenth Amendment in both *Washington* v. *Davis* and *Arlington Heights.* (Pp. 30-31, *supra.*)

The requirement that a state act purposefully to deny or abridge voting rights on racially discriminatory grounds if it is to be held in violation of the Fifteenth Amendment is, as the court of appeals indicated, reflected in others of this Court's decisions construing the Amendment. *Louisiana* v. *United States,* 380 U.S. 145 (1965), one of the court of appeals' examples, and *Lane* v. *Wilson,* 307 U.S. 268 (1939), famed for the dictum that the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination," *id.* at 275, are illustrative of the point that the Amendment nevertheless reaches only those modes of discrimination that have been deliberately contrived by a state. In *Louisiana* v. *United States* the Court found that an "interpretation test" established by Louisiana as a condition to voting registration was unconstitutional. Louisiana had enacted this test only after a prior state statute containing a grandfather clause aimed at excluding blacks from voting had been invalidated.[17] The Court found that the same intent to exclude blacks originally reflected in the grandfather clause underlay the state's subsequent resort to the readily manipulable subjective qualifications for voting. 380 U.S. at 152. In *Lane* v. *Wilson* the Court found a violation of the Fifteenth Amendment in an Oklahoma voting qualifications statute superseding a prior statute containing an unconstitutional grandfather clause. The qualifications statute provided that citizens not voting prior to 1914 had

[17] Strikingly, the 1898 statute containing the grandfather clause had been espoused by the then-Governor of Louisiana as a "more upright and manly" method of "keeping Negroes from voting," than the methods adopted in other states of merely using subjective registration qualifications that were applied in a discriminatory fashion. 380 U.S. at 152.

twelve days in which to register and further that the failure to register in this period would result in perpetual disfranchisement. The Court in *Lane* emphasized that its prior decisions had expounded "the reach of the Fifteenth Amendment against *contrivances* by a state to thwart equality in the enjoyment of the right to vote by citizens of the United States regardless of race or color . . . ." 307 U.S. at 275 (emphasis added).

Once again a useful summary is contained in the separate opinion in *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 179-80 (1977), to which we have referred above. There Mr. Justice Stewart joined by Mr. Justice Powell, citing *Wright* v. *Rockefeller, White* v. *Regester* and other cases, in summarizing the law under the Fifteenth Amendment used the same term "contrivance," a term compatible only with a requirement of deliberate, purposeful state action to abridge or deny voting rights on racial grounds.[18]

[18] In a specially concurring opinion in Nevett v. Sides, 571 F.2d 209, 231 (5th Cir. 1978), Judge Wisdom took issue with the majority's conclusion that proof of a "racially discriminatory purpose" is a necessary requirement of a claim under the Fifteenth Amendment. Judge Wisdom found "nothing in the amendment itself requiring proof of legislative purpose," *id.* at 234, and concluded that the functions that the "intent requirement" serves in litigation under the equal protection clause do not apply to litigation under the Fifteenth Amendment, *id.* at 235-36. Judge Wisdom concluded that, "[w]hatever the status of intent and the right to vote under the equal protection clause, intent should be irrelevant to the fifteenth amendment." *Id.* at 236.

One fundamental flaw in this analysis is reflected in its characterization of the Fifteenth Amendment.

> "The fifteenth amendment provides that the 'rights of citizens of the United States to vote shall not be denied or abridged . . . on account of race.' There is nothing in the amendment itself requiring proof of legislative purpose." *Id.* at 234.

(footnote continued)

B. The Attempt By The Court Of Appeals To Rationalize The Conceded Need For Proof Of A "Discriminatory Intent" With Its *Zimmer* Factors Is Unsuccessful.

The district court did not base its conclusion that black voting power had been unconstitutionally diluted by the at-large manner of election of Mobile County school commissioners on a finding that the dilution was intentional or racially motivated. It concluded, as we have said, that a showing of intent or racial motivation is not required under either the Fourteenth or the Fifteenth Amendment. Its judgment that the at-large election system in Mobile was unconstitutional was based on the effects of the system, as effects are captured in the *Zimmer* factors.

The court of appeals, affirming in its brief unpublished opinion, said that the district court had "applied the

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(footnote continued)
The quotation omits the three critical words: "by any State." With the addition of these words the Fifteenth Amendment provides that the

> "rights of citizens of the United States to vote shall not be denied or abridged . . . *by any State* on account of race, color, or previous condition of servitude." (Emphasis added.)

With this addition it becomes apparent why a claim that, for example, an at-large electoral system violates the Fifteenth Amendment requires proof that the system was the product of a "discriminatory intent." Since an at-large system is neutral on its face, even if the system in fact *results* in some "abridgment" of the right of black citizens to vote, the *State* cannot be said to be responsible for this result. The State in such a case has made no judgment "on account of race, color, or previous condition of servitude." As in the case of a claim that state action neutral on its face violates the equal protection clause, unless this action was the product of a racially discriminatory purpose there is not the predicate of action "by any State" that is expressly required by the Fifteenth Amendment. (See p. 30, *supra*, and *see also* Terry v. Adams, 345 U.S. 461, 473-76 (1952) (Frankfurter, J., concurring).)

proper standards," that its findings were not clearly erroneous and "that these findings amply support the conclusion that Mobile County's at-large election system unconstitutionally depreciates the value of the black vote." (J.A. 2a.) The court then gave the citation: "*See Bolden* v. *City of Mobile,* 571 F.2d 238 (5th Cir. 1978)." Even though the cases were decided by different panels, we have assumed that the court thereby meant to draw support for its affirmance in this case from the analysis reflected in *Bolden.*

In *Bolden,* and the three other cases that the court of appeals consolidated with *Bolden* for decision (p. 24 n.12, *supra*), the court decided, as we have just seen, that a showing of intentional discrimination is necessary in the case of "racially based voting dilution claims." Having so decided, the court attempted the tour de force of turning its *Zimmer* factors into the requisite showing of intent. It held (1) that the *Zimmer* analysis *is* consistent with the requirement that a showing be made that an at-large districting scheme "exists because of invidious racial considerations," and (2) that, as a matter of law, an affirmative finding under the *Zimmer* mode of analysis that is otherwise sustainable *necessarily* satisfies this requirement. *Id.* at 222, 225. Its basic reasoning is in *Nevett* v. *Sides,* 571 F.2d 209, 221-28 (5th Cir. 1978), and there is amplification in *Bolden* v. *City of Mobile, supra* at 245-46.

The court of appeals' effort does not work. Factors that were devised for and used to sustain a judgment that an at-large electoral scheme was unconstitutional because of its effect cannot rationally be transmuted into the equivalent of deliberate racial discrimination.

There is no doubt, to begin with, that the *Zimmer* factors were indeed devised in a case decided solely on the basis of effects and not at all on the basis of purpose.

Judge Wisdom, concurring separately in *Nevett* v. *Sides,* pointed out that uncomfortable fact to his brethren. 571 F.2d at 231. We have described the *Zimmer* decision above. (See pp. 24-27, *supra.)* It requires at least an active imagination to read *Zimmer* as the court of appeals does as "impliedly recognizing the essentiality of intent in dilution cases . . . . " *Nevett* v. *Sides, supra* at 215.

The court's attempt at rationalization does not rise above this flawed source. It runs along these lines.

First, the court recognizes and, for its immediate purpose, makes a virtue of the fact "that mere disproportionate effects are not enough to invalidate an at-large plan and hence . . . the *Zimmer* criteria purport to establish something more." *Id.* at 222. Why the "something more," which plainly was not associated with any requirement of purposeful discrimination when the *Zimmer* criteria were devised, should be so associated now is not clear *a priori.* We submit that the court's explication, *id.* at 222-24, does not make the point any clearer. The court simply asserts that an affirmative finding on any of the *Zimmer* factors constitutes "circumstantial evidence" that the at-large system "exists because of invidious racial considerations." *Id.* at 222. The assertion does not withstand analysis. In fact, several of the *Zimmer* factors could just as well support a finding that a system of at-large election was *not* the result of "invidious racial considerations." Consider the first of the *Zimmer* factors, the "lack of access to the process of slating candidates." As a theoretical matter, a district court finding that a minority had been denied access to the slating process could as easily support an inference that an at-large system was *not* adopted to discriminate against minorities, on the theory that, since the minority had already been thus effectively

excluded from the political process by the demands of slating, there was no need to adopt an at-large system to accomplish this same purpose.

That would be enough except that the court of appeals has a subordinate line of argument that is amplified in *Bolden* v. *City of Mobile* and thus may be particularly relevant to this case. This argument is that, at least in the case of an at-large election system in existence for many years, the *Zimmer* analysis establishes the discriminatory *effect* of the at-large system, and the failure of a state legislature affirmatively to eliminate a system having such a discriminatory effect demonstrates the necessary "discriminatory intent" to maintain the system. *Bolden* v. *City of Mobile, supra* at 245-56.[19]

In the first place, at least on its face this theory does not even require that the state legislature be aware of the discriminatory impact of an at-large system of election for there to be imputed to it an intent to maintain the allegedly discriminatory system. Not suprisingly in view of the exclusive emphasis on effect rather than purpose in *Zimmer,* nothing in the *Zimmer* analysis requires a district court to determine whether the state—whatever "the state" would mean in this context—was aware of any racially disproportionate impact.

Even if the state legislature was aware of the disproportionate racial impact of an at-large election system, the logic of the inference that the court of appeals would draw is highly questionable. As this Court has recognized, a legislature is quite properly motivated by a variety of different considerations in making legislative judgments. *E.g., Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252, 265 (1977). Even in

[19] This reasoning is also suggested in the district court's opinion in the instant case. (See J.A. 30a-33a.)

the case of legislative *action,* courts find it very difficult to determine the legislature's intent. *See, e.g., Palmer* v. *Thompson,* 403 U.S. 217 (1971); *United States* v. *O'Brien,* 391 U.S. 367, 383-84 (1968). This difficulty is magnified many times when the question involves the reasons for legislative *inaction.*

Further, as Judge Wisdom pointed out in his concurring opinion in *Nevett,* 571 F.2d at 231-32, the majority's view of the effect of legislative inaction is also inconsistent with this Court's decision in *Washington* v. *Davis.* In *Washington* v. *Davis,* the district court had found that the testing requirements complained of had a clearly disproportionate impact on blacks. Yet there was no suggestion in this Court's opinion that the necessary discriminatory intent could have been found in the failure of the District of Columbia Police Department to amend its testing procedures to eliminate or ameliorate the apparent disproportionate racial impact.

In fact, the logical result of the discriminatory maintenance analysis suggested by the court of appeals would be to eliminate altogether the requirement of a discriminatory purpose, at least in the cases where an at-large election system has been operated long enough to make the alleged discriminatory impact observable by the state legislature. In all such cases, the argument could be made that the election scheme, though racially neutral in its inception, had become a vehicle for intentional state discrimination because the state had taken no action to correct it. This would, however, be tantamount to a holding that such at-large systems are *per se* unconstitutional when they have such a disproportionate racial result, a proposition that this Court has rejected time and again. (See pp. 42-43, 56-57, *infra.)*

In the course of one such rejection, the Court observed in *Whitcomb* v. *Chavis,* 403 U.S. 124, 156 (1971), that the proposition, "although on the facts of this case limited to guaranteeing one racial group representation, is not easily contained." Other interest groups would no doubt seize upon the theory to litigate claims that particular at-large election systems "intentionally" discriminate against their interests because of their allegedly "known" impact of submerging "their votes" in the general votes. "At the very least, affirmance . . . would spawn endless litigation concerning the multimember district systems now widely employed in this country." *Id.* at 157.

The artificiality of the court of appeals' whole endeavor is perhaps best manifested in one passage of its opinion in *Bolden* v. *City of Mobile, supra.* The court was dealing there, this Court will recall, with a district judge —the same district judge who decided this case—who thought that *Washington* v. *Davis* and the *Zimmer* criteria were at odds. The court, after concluding that the district judge's findings were not clearly erroneous and that they supported his conclusion that the at-large electoral system of the City of Mobile "unconstitutionally depreciates the value of the black vote," said that these findings also "compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment . . . ." 571 F.2d at 245. In other words—and this must have been the reasoning in our case as well—whether the district judge realized it or not, he correctly inferred the intent that he thought was unnecessary from the analysis of the *Zimmer* factors that he engaged in for a wholly different purpose.

If fashions of judicial opinion writing were those of another day, the court of appeals might have said that the

presence of *Zimmer* factors gives rise to a necessary presumption of discriminatory intent. That is in fact the point to which its treatment of the matter brings it. One of the great masters has taught us that, when a judge says that *A* is necessary but *A* can be presumed from *B*, he is in fact saying that *A* is not necessary and *B* is sufficient. 9 Wigmore, *Evidence* § 2492 (3rd ed. 1940). We do not believe that this Court meant anything so trivial by its recent insistence on a showing of purposefulness in constitutional discrimination cases as would be the case if something like the *Zimmer* factors were sufficient to satisfy its insistence.

II. EVEN ASSUMING THE APPLICABILITY OF THE *ZIMMER* CRITERIA TO A DETERMINATION OF THE CONSTITUTIONALITY OF THE AT-LARGE ELECTION OF MOBILE COUNTY SCHOOL BOARD MEMBERS, THOSE CRITERIA WERE NOT SATISFIED ON THIS RECORD.

The beginning point in any voting power dilution case is an at-large scheme of election in which, because of racially polarized voting habits (or politically polarized voting habits), a minority, racial or otherwise, is chronically unrepresented or underrepresented. The law is clear that the plaintiff must advance substantially beyond that beginning point in order to prevail. "This Court has . . . rejected the proposition that members of a minority group have a federal right to be represented in legislative bodies in proportion to their number in the general population." *Beer* v. *United States,* 425 U.S. 130, 136 n.8 (1976), citing *Whitcomb* v. *Chavis,* 403 U.S. 124, 149 (1971). *See also White* v. *Regester,* 412 U.S. 755, 765-66 (1973): "To sustain claims [that multi-member districts are being used invidiously to cancel out or

minimize the voting strength of racial groups] it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential."

Just last year the Court said that, although "voting for or against a candidate because of his race is an unfortunate practice," it happens; and "in any district where it regularly happens, it is unlikely that any candidate would be elected who is a member of the race that is in the minority in that district." *United Jewish Organizations* v. *Carey,* 430 U.S. 144, 166-67 (1977). The Court then made clear that these facts alone are without constitutional significance.

> "However disagreeable this result may be, there is no authority for the proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process." *Id.* at 167.

In this section of our argument we assume, for the sake of the argument only, that whatever it is that must be proved beyond a lack of proportional representation because of the inability to win elections is fairly summed up in the *Zimmer* factors utilized by the district court. Even on this assumption there is no proper basis for either the district court's judgment or the court of appeals' affirmance of it. On analysis, the district court found little more than that there is polarized voting in Mobile County that has prevented the election of blacks to a school board that has engaged in litigation over student and faculty desegregation in the aftermath of *Brown* v. *Board of Education,* 347 U.S. 483 (1954). The description fits so many southern communities as to indicate, except to one

ready to condemn the entire region because of the sins of the past, its utter lack of utility in distinguishing those jurisdictions that invidiously discriminate against black voters from those that do not. In addition, the court did not give proper weight to the policy embodied in at least 140 years of at-large elections for Mobile's school commissioners.

In short, the district court's judgments with respect to each of the four primary *Zimmer* factors were based on an incorrect view of the law or were clearly erroneous.[20] Accordingly, there is no basis for the district court's ultimate conclusion that "plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors catalogued in *Zimmer.*" (J.A. 41a.) [21]

[20] If the district court's findings on each of the *Zimmer* factors involved "basic facts," they would be entitled to great weight and could be set aside only if "clearly erroneous," Fed. R. Civ. P. 52(a), that is, only if this Court "on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). However, the district court's findings on these *Zimmer* factors are manifestly not such "basic facts" but are instead either "ultimate findings" derived from more basic findings or "conclusions of law," which are not entitled to the "clearly erroneous" deference. *See* United States v. Mississippi Valley Generating Co., 364 U.S. 520, 526 (1961); United States v. DuPont & Co., 353 U.S. 586, 598 (1957); 9 Wright & Miller, Federal Practice and Procedure: Civil §§ 2583 *et seq.* (1969). Indeed, as will be developed below, in the case of each of the *Zimmer* factors the "basic facts found by the District Court [will] demonstrate the error of its conclusion." United States v. DuPont & Co., *supra* at 598. Further, to the extent that the district court's judgments on these *Zimmer* factors are considered findings of fact within the scope of Rule 52(a) we submit that they are "clearly erroneous."

[21] The district court also briefly considered each of the "enhancing" factors identified in *Zimmer*—the existence of large districts, majority vote requirements, anti-single shot voting provisions, and the absence of geographical subdistricts—and found all essentially present. (J.A. 39a-40a.) It seems apparent, however, that the district court's ultimate conclusion of "voter dilution" was not

(footnote continued)

To reiterate, the primary *Zimmer* factors, *Zimmer* v. *McKeithen, supra,* 485 F.2d at 1305, are as follows:

> (1) A demonstration that minority residents suffer "a lack of access to the process of slating candidates."
>
> (2) A demonstration that there is an "unresponsiveness of legislators" to the "particularized interests" of the minority.
>
> (3) A demonstration that there is no more than a "tenuous state policy underlying the preference for multi-member or at-large districting."
>
> (4) A demonstration that "the existence of past discrimination in general precludes the effective participation [of the minority] in the election system."

For convenience of discussion we group the first and fourth factors and deal with their treatment by the district court first, then with the second factor and finally with the third, the policy that has underlain Mobile's at-large election system for the past century and a half.

(footnote continued)

substantially influenced by its conclusions on these "enhancing" factors. (J.A. 40a-42a.) In fact, the district court quite evidently disagreed with the rationale of the third enhancing factor (the presence of an anti-single shot voting provision), believing from his "15 years experience as a state judicial officer subject to the electoral process" that the "public's best interest is served" by the Alabama equivalent of a prohibition of single-shot voting, the requirement that, when two or more at-large seats are at stake, candidates run "head to head" for designated seats. (J.A. 22a n.16.)

A. The District Court's Conclusions On The First And Fourth *Zimmer* Factors Are Nothing More Than A Function Of What Is Acknowledged But Cannot Support The Court's Result, The Evidence Of Racially Polarized Voting Habits.

1. The district court's conclusion that blacks were denied "equal access to the slating or candidate selection process" is erroneous and reflects a misunderstanding of this factor.

The basic facts found by the district court in considering the first *Zimmer* factor—access to the process of slating candidates—were (a) that "[t]here are no formal prohibitions against blacks seeking office in Mobile County," (b) that "blacks register and vote without hindrance," (c) that the "election of the school commissioners is partisan and black[s] and whites participate in both parties," and (d) that "[a]ny person interested in running for school commissioner is able to do so." (J.A. 12a, 36a.)

On the strength of such findings, the court should have concluded that blacks did have equal access to the slating or candidate selection process. The situation in Mobile stands in sharp contrast to the situation in Dallas County, Texas, a subject of this Court's opinion in *White* v. *Regester*, 412 U.S. 755 (1973), from which the first *Zimmer* factor was derived.[22] Dallas County black citizens had been "effectively excluded from participation in the Democratic primary selection process," largely through

[22] There is no doubt of the source of this factor or of its importance. Indeed, in making denial of access but one of several factors designed to test whether an at-large system of elections has the effect of diluting minority voting power, we believe that the court of appeals misapprehended the nature and significance of what this Court had to say about the denial of access in White v. Regester, 412 U.S. 755, 766-68 (1973). (Pp. 57-60, *infra*.)

the operation of a "white-dominated" slating organization that was "in effective control of Democratic Party candidate slating" in Dallas. 412 U.S. at 766-67. The district court also found that the organization "did not need the support of the Negro community to win elections" and that it "did not therefore exhibit good faith concern for the political and other needs and aspirations of the Negro community." *Id.*

The district court in this case found no such slating organization operating in Mobile County. Indeed, although not mentioned by the district court in its opinion, the record clearly indicates that there is no effective "white-oriented" slating organization at all (J.A. 247a, 330a-31a; Tr. 494-95), and that the only effective political organization in Mobile County primaries is the Non-Partisan Voters League, a local black endorsing organization (J.A. 315a, 329a, 411a, 414a-15a). The League was described as "the single most effective endorsing organization" in the County and in fact "the most cohesive and most effective voter organization in Mobile County." (J.A. 315a.)

Nor is there evidence in the record that blacks are otherwise prevented from becoming candidates for the Mobile County school board. For example, at the time of trial the position of school commissioner was not a paid position and, in part for this reason, the cost of a school board election campaign has been modest, $2,000 to $5,000. (J.A. 331a, 343a, 413a; Tr. 618.) The principal campaign effort is to generate name recognition among the voters (J.A. 414a-15a; Tr. 1320-21), with paid advertising consisting principally of placards, cards, bumper stickers, etc. (J.A. 326a; Tr. 679).

Neither black candidates nor others testified to any barriers, formal or informal, to blacks becoming candidates for the school board. Mrs. Lonia M. Gill, a black

educator who was defeated in a run-off election for the board in 1974, testified that she campaigned countywide (J.A. 326a), that she got compaign contributions from both whites and blacks (J.A. 327a), that she received the endorsement of the Mobile County Teachers Association as well as the Non-Partisan Voters League and several other groups (J.A. 327a-28a), and that, although she lost in her first bid for public office, she "enjoyed the campaign, because it was very rewarding" (J.A. 326a).

Nevertheless, the district court concluded in terms that blacks were denied "equal access to the slating or candidate selection process." (J.A. 15a.) But that conclusion was solely a function of the court's mistaken view that blacks could be said to be "denied access" to the candidate selection process if they were "discouraged" from becoming candidates for the Mobile County school board by a combination of (1) racially polarized voting, (2) the numerical minority of black voters in Mobile County, and (3) the fact that four blacks had run unsuccessfully for the school board since 1962, Mrs. Gill being the latest. (J.A. 11a-15a.) But a conclusion that elections are lost in part because of the "unfortunate practice" of voting for or against someone on account of his race simply returns us to the beginning point of the inquiry. It is not the "something more" that each *Zimmer* factor is supposed to be.

There is no doubt that the basis of the district court's conclusion is as we have stated it. Its basic findings that there are no obstacles to black participation in the political process have been quoted or cited above. These findings plainly do not support its conclusion. As support, it cited only the evidence that blacks had lost school board elections and testimony indicating "general polarization in the white and black voting." Since black voters are a numerical minority in Mobile County—accounting for

24.4 percent of the vote in the 1976 primary election (J.A. 9a)—the testimony indicated that such racially polarized voting made it "highly unlikely" that a black candidate could be elected when running against a white candidate. That fact in turn was said to "discourage" blacks from running for the school board. (J.A. 15a.) The court's reasoning from these data to a conclusion that access is denied is quite transparent:

> "The court finds that the structure of the at-large election of school commissioners combined with strong racial polarization of the county's electorate continues to effectively discourage qualified black citizens from seeking office or being elected thereby denying blacks equal access to the slating or candidate selection process." (*Id.*)

2. The district court's conclusion that the existence of past discrimination "precludes the effective participation" of blacks in the Mobile County school board election system is unsupported by its findings or by any credible evidence.

Unquestionably there has been past discrimination against black voters in Mobile, in Alabama and in the South. It does not take a lawsuit to establish that fact. The fourth inquiry called for by *Zimmer* is whether the existence of such past discrimination "precludes the effective participation" of blacks in the present electoral system.

Instead of making that inquiry, the district court again returned to the beginning point and noted that voting in Mobile County is racially polarized. Thus, the court said:

> "The racial polarization existing in the city and county elections has been discussed herein.

> The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners." (J.A. 21a.)

There is absolutely no analysis of what past discrimination against black voters—characteristic of the entire South—has to do with polarized voting in Mobile County, much less of how it operates to preclude blacks from participating in Mobile County school board elections.

If the district court's ultimate findings are enough to satisfy the first and fourth *Zimmer* criteria, then those criteria add nothing to the phenomenon of polarized voting, which is the point at which analysis is supposed to begin. On the other hand, the court's underlying findings in substance dictate a conclusion that is the opposite of the court's own, that is, that, polarization aside, past discrimination has been overcome and there are today no barriers to black participation in the Mobile County political process. If, therefore, the *Zimmer* criteria are relevant at all to the judgment in this case, the first and fourth factors work for the school board, not for plaintiffs.

B. The District Court's Conclusion That The At-Large Elected Mobile County School Board Members Have Not Been Responsive To Minority Needs Reflects A Misplaced And Unjustified Reliance On Conclusions Reached In Unrelated Litigation.

The district court's discussion of whether Mobile County school board has been "responsive to minority needs," the second *Zimmer* factor, deals almost exclusively with a desegregation lawsuit in which the school board has been engaged since 1963. There is no

significant treatment of the question whether the board in its day-to-day operations and in its planning has been responsive to the "particularized needs" of black residents or black parents or black children. The court concluded on the basis of its understanding of the separate desegregation lawsuit that the Board had been guilty of "dilatory practices." (J.A. 37a.) It also reasoned that because the Board continues to operate under the "watchful eye of the court" in that action, the Board "cannot justly claim credit for the improvement of the school system today." (J.A. 37a-38a.)

The district court cited and quoted from eight specific opinions or orders in this separate desegregation lawsuit, the latest of which is in *1970.* (J.A. 15a-20a.) It made no effort to explain how these materials could possibly support its conclusion that the Mobile County school board "has not [been], and *is not,* responsive to blacks on an equal basis with whites." (J.A. 37a; emphasis added.)

In short, the district court's findings on this point do not advance analysis at all. The fact is that, on the record, there is no persuasive evidence of unresponsiveness.

C. The District Court's Conclusion That The State Policy Underlying The At-Large Election Of Mobile County School Board Members Is "Neutral" Was Premised Upon A Misreading Of The Purpose Of This Factor And Is Inconsistent With The Basic Facts Found By The District Court.

If any fact was not seriously disputed below, it was the long-standing and continuous commitment by the people of Mobile County and the State of Alabama to the at-large election of the members of the governing body of

the Mobile County public schools. This fact was reflected in the following basic facts found by the district court and not substantially disputed by plaintiffs:

> (1) The at-large system of electing the members of the governing body of the Mobile County public schools began with the creation of this body in 1826, several years after Alabama was admitted to the Union. (J.A. 20a.)[23]
>
> (2) From the beginning Mobile County's public school system, including the at-large manner of electing the members of its governing body, has been accorded a unique status by the Alabama legislature. Thus, the first general public school system in Alabama was not established until 1854, 28 years after creation of the Mobile County public school system. Further, even in this 1854 Act the Alabama legislature specifically "recognized and maintained the Mobile County schools separate and apart from the school system for the State." (*Id.*) The special status of the Mobile County public school system has been continued, as evidenced in Section 270 of Article XIV of the Alabama State Constitution, which has been construed to insulate the Mobile County public school system from legislative acts of general application. (J.A. 10a.)
>
> (3) Although there have been numerous actions by the Alabama legislature dealing with or affecting the Mobile County public schools since 1826, there has been no change in the at-large manner of electing the Mobile County school commissioners. (J.A. 20a.) These legislative changes have included separate acts in 1854, 1875, 1876, 1901 and 1919. Throughout this period of a century and a half, the State of Alabama has continued to provide for the at-large election of members of the governing body of the Mobile County public schools.[24]

[23] Although there is some ambiguity in the language of this 1826 Act on the manner of electing these members, it is clear that at least by 1836 the members were to be elected on an at-large basis. (Pp. 7-8 & n.5, *supra.*)

In short, there was abundant evidence, and no real dispute, that, as the district court found, "[t]he manifest policy of Mobile County has been to have at-large or multi-member districting." (J.A. 20a.) That there are good reasons, racially neutral, for such a commitment to at-large elections is demonstrated in a subsequent section of our argument. (See pp. 64-69, *infra.*)

Nevertheless, the district court concluded that this *Zimmer* factor was "neutral," because of its conclusion that there is "no clear cut *State* policy either for or against multi-member districting or at-large elections in the State of Alabama, considered as a whole." (J.A. 20a; emphasis in original.) The evident assumption underlying the district court's conclusion—which was not supported by any specific facts or discussion—was that the state policy "considered as a whole" should govern.

That assumption is inconsistent with the apparent purpose of this *Zimmer* factor, which is to assess whether the particular at-large election system being challenged reflects a substantial state interest. In the case of a challenge to a state-wide apportionment scheme, as was involved in *White* v. *Regester,* or even to a state-wide

[24] Following the filing of the present lawsuit, in the summer of 1975 the Alabama legislature did enact legislation reapportioning the Mobile County school board into separate single-member districts. However, an Alabama state court declared that this legislative action was defective because of the manner in which notice of the legislation was published. (J.A. 23a.)

policy, as was involved in *Zimmer* v. *McKeithen* itself, it may well be appropriate to focus on the policy of the state "considered as a whole." But such a focus is illogical when the question is the state's commitment to at-large elections for the members of a single local entity such as the Mobile County school board. There is simply no reason why the "manifest policy" underlying the at-large election of this governing body should have been ignored because in other contexts the state has adopted different election procedures.[25]

III. JUDGED BY PROPER STANDARDS, THE AT-LARGE ELECTION OF MOBILE COUNTY SCHOOL COMMISSIONERS IS NOT UNCONSTITUTIONAL.

The judgment below is wrong if taken on its own terms. The *Zimmer* factors are not the appropriate criteria for judgment, and they were in any event not satisfied. So we have shown in the foregoing sections of the brief. In this section we show that under a correct construction of the Constitution the at-large manner of electing Mobile County school commissioners violates neither the Fourteenth nor the Fifteenth Amendment. Specifically, we show that under the standards for decision that have been established by this Court, plaintiffs must prove either

1. that the at-large plan was conceived as a purposeful device to discriminate against black voters and political candidates in Mobile County; or

[25] Indeed, if the "local component" of the state policy were reversed—if, for example, the state abruptly switched to an at-large system of electing school board members for a particular "County X" in a situation where black voters shifted from being a voting majority to be a voting minority in the County—it is difficult to imagine that the district court or the court of appeals would—or should—adopt the same view of the "neutrality" of state policy "considered as a whole." *Cf.* Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975) (*per curiam*) (three judge court), discussed at p. 61 n. 29, *infra*.

2. that black voters and candidates in Mobile County are being deliberately excluded from the political process, and that the division of the County into single-member school-commissioner districts is necessary to remedy this exclusion.

We next show that plaintiffs have neither alleged nor proved that at-large voting for Mobile school commissioners was devised with the intent to discriminate against blacks and have not proved that blacks are excluded from the Mobile County political process. Indeed, the record affirmatively establishes that the opposite is true in each instance. Finally, we note that plaintiffs' case falls especially short because this Court's standards of decision have been developed in the context of state legislative multi-member districts, and this case deals with a single municipal body, as to which the policy considerations favoring at-large elections are stronger and the potential disadvantages weaker than in the case of state legislative districting.

A. To Establish That An At-Large System Of Elections Is Unconstitutional, Plaintiffs Must Prove Discriminatory Intent Or Exclusion From The Political Process.

The issue of the constitutionality of multi-member districts has frequently been presented to the Court. Although the Court has reflected its awareness of the vigorous debate in the social science literature about the claimed advantages and disadvantages of multi-member districts, including their possible effects on the voting

strengths of minority populations,[26] it has squarely held that such districts are not *per se* illegal under the Constitution. *See, e.g., Kilgarlin* v. *Hill,* 386 U.S. 120 (1967); *Burns* v. *Richardson,* 384 U.S. 73 (1966); *Fortson* v. *Dorsey,* 379 U.S. 433 (1965). Indeed, although in *Lucas* v. *Colorado General Assembly,* 377 U.S. 713 (1964), decided the same day as *Reynolds* v. *Sims,* 377 U.S. 533 (1964), the Court noted certain undesirable features of multi-member districts, it expressly declined to say "that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective." 377 U.S. at 731 n.21.

Whitcomb v. *Chavis,* 403 U.S. 124 (1971), contains the Court's most extended discussion of the constitutional implications of multi-member districts. *Whitcomb* involved at-large elections in Marion County, Indiana. The Court held that plaintiffs' case did not fall within the ambit of previous cases such as *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), inasmuch as "there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to further racial or economic discrimination." 403 U.S. at 149. The Court next held that

[26] The debate continues to rage but, as Professor Eugene Lee and Jonathan Rothman note in their recent article, *San Francisco's District System Alters Electoral Politics,* 67 Nat'l Civic Rev. 173 (1978), the evidence on either side is scant.

> "America's large cities (the 24 with a population of more than 500,000 in 1975) are nearly evenly divided among those using the district system, the at-large system or some combination of the two. Yet too little is known about the way in which citizens choose their urban leaders, in particular about the implications of at-large versus district elections. A review of the meagre and generally dated literature on the subject reveals an abundance of conventional wisdom and a lack of empirical evidence."

the fact that racial minorities appeared unable to elect members of the same minority to the state legislature did *not* "satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice." *Id.* The Court concluded:

> "The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system." *Id.* at 154-55.

White v. *Regester,* 412 U.S. 755 (1973), is the only decision of the Court in which a constitutional challenge to multi-member districts has been sustained.[27] It follows strictly the teaching of *Whitcomb* v. *Chavis.* In *White* v. *Regester* the Court upheld the "intensely local appraisal" by the district court "of the design and impact" of the multi-member districts in two Texas counties. 412 U.S. at 769. The district court had concluded that the multi-member districts fashioned for Dallas and Bexar counties were unconstitutional as "invidiously discriminatory" against blacks (in Dallas County) and against Mexican-Americans (in Bexar County). *Id.* at 765-70.

The Court emphasized at the outset that "[p]lainly, under our cases, multimember districts are not *per se*

[27] Although the Court has noted that multi-member districts are a disfavored remedy when directed by a court in a reapportionment case, *see, e.g.,* Connor v. Johnson, 402 U.S. 690 (1971), the Court has consistently emphasized that the same standards do not apply when it reviews electoral systems devised by state legislatures, *see* Chapman v. Meier, 420 U.S. 1, 18-19 (1975).

unconstitutional . . . ." *Id.* at 765. It continued, building on the suggestion in *Whitcomb* v. *Chavis* that breaking up multi-member districts might be necessary as a remedy for a more fundamental deliberate exclusion of minority groups from the political process:

> "But we have entertained claims that multi-member districts are being used invidiously to cancel out or minimize the voting strength of racial groups . . . . To sustain such claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice. *Whitcomb* v. *Chavis, supra* at 149-50." *Id.* at 765-66 (citations omitted).

Thus, under *Whitcomb* v. *Chavis* and *White* v. *Regester,* there are two bases on which an at-large system of elections may be set aside by a federal court. First, the system can be found to be the product of purposeful discrimination. If so, under the teaching of *Gomillion* v. *Lightfoot,* 364 U.S. 339 (1960), and other cases, the at-large system is unconstitutional.[28] An example of such unconstitutionality is the at-large system of municipal

[28] Thus, in *Whitcomb,* the Court, after citing its decision in Gomillion v. Lightfoot, 364 U.S. 339 (1960), emphasized that "there is no suggestion here that Marion County's multi-member district . . . [was] conceived or operated as [a] purposeful device[ ] to further racial or economic discrimination." 403 U.S. at 149.

elections decreed by the Mississippi legislature in 1962, found by the court in *Stewart* v. *Waller,* 404 F. Supp. 206 (N.D. Miss. 1975) (*per curiam*) (three judge court), to be illegally racially motivated. (See p. 61 & n.29, *infra.*) But *Whitcomb* and *White* make clear that a discriminatory intent may not be inferred from the mere inability of minorities to elect representatives in proportion to their number in the population. *See also United Jewish Organizations* v. *Carey,* 430 U.S. 144, 166-67 (1977).

The other basis established by *Whitcomb* and *White* for ordering a multi-member district broken up into single-member districts is as a remedy for the unconstitutional exclusion of a minority from "the political processes leading to nomination and election . . . ." *White* v. *Regester, supra* at 766, citing *Whitcomb v. Chavis, supra* at 149-50. The creation of single-member districts in one or more of which the complainant minority is likely to preponderate in numbers is an effective remedy for the minority's exclusion from slating and other aspects of the political process. Once the minority vote is extracted from the pool of other votes that has diluted its strength, minority interests and minority candidates can no longer be ignored, at least in those newly-created districts in which the minority voting power preponderates—and especially if racially polarized voting is characteristic of the jurisdiction. But the necessary predicate for such a remedial order is a finding that the minority has been excluded from the political process. *See* Casper, *Apportionment and the Right to Vote,* 1973 S. Ct. Rev. 1, 24-29. If there is no such exclusion in the first instance—if minority candidates are able freely to put themselves forward for election even though with indifferent success because of the "unfortunate practice" of voting according to a candidate's race—there is no constitutional

wrong to be remedied, "[h]owever disagreeable this result may be . . . ." *United Jewish Organizations* v. *Carey, supra* at 166-67.

When these proper standards are applied to the record in this case, it becomes apparent that there is no basis for a finding that Mobile County's method of electing school commissioners is unconstitutional.

B. There Is No Basis In The Record For A Conclusion That Mobile County's At-Large System Of Elections Should Be Dismantled For Constitutional Reasons.

1. The courts below could not possibly find that plaintiffs have shown that Alabama's commitment to at-large elections for Mobile County school board members was conceived as a purposeful device to discriminate against black residents or voters.

The argument on this point can be brief. Simply put, there is no basis from which the district court could have found (even if the plaintiffs had alleged) that the century-and-a-half commitment of the State of Alabama to the at-large election of the governing body of the Mobile County public schools was conceived in racial animus. The relevant facts are recited above. In summary:

The decision that the Mobile County school commissioners should be elected from the County at large was made in the early part of the nineteenth century when such a decision could not have been influenced by any intention to prevent blacks from being elected to the board. This point was made by plaintiffs' own witness, Dr. McLaurin, the history professor. Dr. McLaurin testified, it will be recalled (pp. 9-10, *supra*), that (1)

blacks were completely excluded from the Alabama political system until at least 1865, (2) accordingly, until 1865 it would have been unnecessary for the Alabama legislature to establish any particular method of electing the governing body of the Mobile County public school system to exclude the possibility that blacks would be elected, and (3) indeed, such a possibility would not even have occurred to the people of Mobile County or of Alabama.

The current statute providing for at-large elections dates from 1919 (or 1933 or 1939), maintains a policy that has prevailed since at least 1836 and was enacted under the authority of a constitution that, as Dr. McLaurin explained, from its adoption in 1901 through at least 1944 effectively excluded blacks from any involvement in Alabama political life. Dr. McLaurin added that during this period it would have been unnecessary for Alabama to adopt any particular election system to prevent blacks from being elected to the Mobile school board, and even the possibility that blacks might someday be able to vote would not have been a major motivating factor in any legislative action. (P. 10, *supra.*)

In short, the testimony of plaintiffs' own witness belies any possible claim that Alabama's commitment for a century and a half to the at-large election of the governing body of the Mobile County school system was motivated by a purpose or intention to discriminate against blacks. This case has nothing in common with *Stewart* v. *Waller,* 404 F. Supp. 206 (N.D. Miss. 1975) (*per curiam*) (three judge court), where a racial purpose was found in at-large municipal election legislation. [29]

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[29] At issue in *Stewart* v. *Waller* was a 1962 Mississippi enactment requiring for the first time that all aldermen in all Mississippi municipalities, irrespective of their population, be elected on an at-large basis. This was a fundamental departure in state election law.

(footnote continued)

2. The courts below could not possibly find plaintiffs to have demonstrated that blacks were "excluded" from or denied equal access to the political process of electing Mobile County school commissioners.

There is no basis in the record from which the district court could conceivably have found that blacks have been "excluded" from or denied "equal access" to the political process leading to the election of Mobile County school board members.

We have detailed above the errors that the district court made in applying the *Zimmer* factors, and to a large extent that discussion anticipates the discussion at this point. (Pp. 46-50, *supra.*) The district court's basic error was in implicitly assuming that its finding that blacks were "discouraged" or "shied away" from at-large elections in Mobile County could support its conclusion that blacks were denied "equal access" to the slating or candidate selection process. As indicated above, the district court's opinion itself makes it clear that any such discouragement was not the result of any formal or informal barriers to becoming a candidate or enlisting support but rather resulted from racially polarized voting combined with the numerical minority—estimated at 24 percent—of blacks in the voting population of Mobile County as a whole. Thus, the district court in substance found merely a

(footnote continued)
404 F. Supp. at 210. Prior to 1962, cities of over 10,000 population were required to elect six of seven aldermen by individual wards, and smaller municipalities had been given discretion to use this modified ward system. *Id.* at 209. The district court found that the shift to at-large elections was manifestly motivated by discriminatory motives—the legislation's author had urged its passage on the ground that it was "needed to maintain our southern way of life"—and that the defendants had "offered no alternative nonracial explanation" for the legislation. *Id.* at 214.

minority and voting polarization—the starting point for analysis in a voting power dilution case, as we have said, not the end point.

Once the misconception that "discouragement" arising from electoral defeats amounts to a denial of "equal access" to the political process is cleared away, one is bound to conclude from the district court's findings themselves that blacks were not denied equal access to the political process relating to election to the Mobile County school board. The district court, it bears repeating, found that:

> 1. "There are no formal prohibitions against blacks seeking office in Mobile County." (J.A. 12a.)
>
> 2. "[B]lacks register and vote without hindrance." (*Id.*)
>
> 3. "The election of the school commissioners is partisan and black[s] and whites participate in both parties." (*Id.*)
>
> 4. "Any person interested in running for school commissioner is able to do so." (J.A. 36a.)

These specific findings are supported by the record. Contrary findings would not be. There is therefore no basis in the record from which the district court could have found that black voters or black potential candidates were denied equal access to the political process in any sense of this concept that could underlie a finding of a constitutional deprivation.

C. The Standards Against Which Claims Of Unconstitutional Dilution Of Voting Power Are To Be Tested Should Be Even More Rigorous In This Case, Involving As It Does A Single Local Body Rather Than A Multi-Member Legislative District.

The relevant constitutional standards established by this Court have been developed in cases involving the constitutionality of multi-member districts from which members of statewide legislative bodies were elected. As noted by four Justices specially concurring last term in *Wise* v. *Lipscomb*, 98 S.Ct. 2493, 2502 (1978):

> "While this Court has found that the use of multimember districts in a state legislative apportionment plan may be invalid if 'used invidiously to cancel out or minimize the voting strength of racial groups,' *White* v. *Regester*, 412 U.S. 755 (1973), we have never had occasion to consider whether an analogue of this highly amorphous theory may be applied to municipal governments."

That such an analogue may be applied to a municipal entity such as a school board was assumed by the parties and the tribunals below, and the question whether that application was appropriate was not presented in the jurisdictional statement. As has been demonstrated by all the foregoing discussion, a negative answer to the question is not necessary to compel a reversal of the judgment in this case because the theory or its analogue was in any event misapplied. We think it appropriate, nevertheless, to point out some of the considerations that give special weight to a legislative judgment that a local governing body should be elected at large and that we therefore believe justify an especially rigorous application of the

White v. *Regester* and *Whitcomb* v. *Chavis* standards of decision in a case concerning such a body.

The district court in the *Wise* case itself, upholding the at-large election of Dallas city council members, emphasized the reasons why such electoral schemes are of particular importance in the context of a local government:

> "There is . . . [a] need for a city-wide view on the part of council. The council has responsibility for policies which affect the city as a whole, as well as those which affect specific geographic and demographic parts. Several members of the present council and the present City Manager presented the view that having some members of the City Council elected on a city-wide basis would be desirable." *Lipscomb* v. *Wise*, 399 F. Supp. 782, 794 (N.D. Tex. 1975).

The district court's findings were based in part on this Court's caution in *Chapman* v. *Meier*, 420 U.S. 1, 20 n.14 (1975), that "multimember districts may insure that certain interests such as city-or region-wide views are represented," citing Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. Pa. L. Rev. 666, 695-96 (1972). Indeed, there are many suggestions in this Court's opinions that methods of electing the members of local governmental bodies are not indiscriminately to be judged by criteria applicable to state-wide elections:

> —Earlier this Term in *Holt Civic Club* v. *City of Tuscaloosa*, No. 77-515, Nov. 28, 1978, slip op. at 11, this Court recognized the "extraordinarily wide latitude that states have in creating various types of political subdivisions

and conferring authority upon them" in rejecting an equal protection challenge to an Alabama statute subjecting residents located within three miles of Tuscaloosa's corporate limits to various regulations without grant of a concomitant voting franchise.

—In *Abate* v. *Mundt,* 403 U.S. 182, 185 (1971), the Court held that "slightly greater percentage deviations may be tolerable for local government apportionment schemes," reflecting in part the view that local governing bodies perform different functions and have a different relationship to their constituencies than state or federal legislatures. *See also* Note, *Supreme Court 1970 Term,* 85 Harv. L. Rev. 3, 148-49 (1971).

—In *Avery* v. *Midland County,* 390 U.S. 474, 485 (1968), the Court stated its awareness "of the immense pressures facing units of local government, and of the greatly varying problems with which they must deal. The Constitution does not require that a uniform straitjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems."

—In *Sailors* v. *Board of Education,* 387 U.S. 105, 110-11 (1967), the Court emphasized the unique problems of local governments, stating that "[v]iable local governments may need . . . great flexibility in municipal arrangements to meet changing urban conditions." *See also Dusch* v. *Davis,* 387 U.S. 112, 116-17

(1967) (local governments are faced with the "complex problems of the modern megalopolis . . . .")

At-large election of members of local government bodies requires each member to be sensitive to the needs of the entire community; the member is answerable not to the parochial concerns of the residents of a particular geographic district but to the needs of the larger community. Such a broader view of the constituency is particularly appropriate for members of a school board, whose judgment should be guided by general concerns for the promotion of good educational standards, not the narrow views of a particular district.

The Court noted in *Fortson* v. *Dorsey,* 379 U.S. 433, 437-38 (1965), the importance of the "practical realities of representation in a multi-member constituency," speaking there, to be sure, of a state senator elected at large:

> "[S]ince his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator." *Id.* at 438.

See also Dallas County v. *Reese,* 421 U.S. 477, 479-80 (1975) *(per curiam); Dusch* v. *Davis, supra* at 116-17.

The "practical realities" emphasized in *Fortson* concerned state-wide electoral office; those realities become more important when we deal with local governing bodies where, as the Court is aware, direct public involvement in decision-making is often greater, communication between elected officials and citizen groups is often active and

open, and the governmental functions served involve the day-to-day concerns of the community.[30]

Moreover, the use of at-large elections for local officials generally involves quite different considerations from the use of similar systems in elections of state legislators. All citizens within a district are treated alike, there is no crazyquilt pattern of some citizens voting only in single-member districts and others voting at-large. And, once elected, the members of local governing bodies must work together in administering the affairs of their communities, unlike the role of state legislators who function in structured majority/minority party blocs, voting on individual pieces of legislation. Indeed, some local governmental units, such as school boards, serve principally administrative functions. What they do has little or nothing in common with what goes on in the legislative chambers and hearing rooms of the statehouse.[31]

[30] Thus, in both Cantwell v. Hudnut, 566 F.2d 30, 37-38 (7th Cir. 1977), *petition for cert. filed,* No. 77-1615, May 12, 1978, and Wallace v. House, 515 F.2d 619, 633 (5th Cir. 1975), *vacated and remanded on other grounds,* 425 U.S. 947 (1976), the courts emphasized the unique problems of local governing bodies and the value of at-large elections to reflect the views of the entire constituency.

[31] The use of at-large elections together with the introduction of a council-manager form of city government was widely regarded as a needed reform in urban government around the turn of the century, to reduce partisanship in municipal governance and to promote city-wide attitudes on the part of elected officials. *See* E. Banfield and J. Wilson, *City Politics* 151 (1963); Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors,* 12 Urb. Aff. Q. 223 (1976); Neighbor, *The Case Against Nonpartisanship: A Challenge from the Courts,* 66 Nat'l Civic Rev. 448 (1977). As Professor Rehfuss concluded, "[m]unicipal reformers in the United States contend that the council manager form of government works best when citywide rather than ward elections are used to select councilmen." Rehfuss, *Are At-Large Elections Best For Council-Manager Cities?* 61 Nat'l Civic Rev. 236 (1972).

(footnote continued)

At any rate a state legislature may reasonably and legitimately have weighed considerations such as these when it chose to provide for at-large municipal elections. The rationality of such a choice of at-large elections for municipal officials should count heavily in any judgment of its constitutionality.

CONCLUSION

The judgment below should be reversed. The errors of the district court and the court of appeals are palpable. They mistook the standards that governed decision, and they misapplied the standards that they mistakenly invoked. If proper constitutional standards are properly applied, the plaintiffs have no case. The at-large manner of electing the commissioners of the Mobile County school system is constitutional. It does not operate to deny black citizens of Mobile County the equal protection of the laws or deny or abridge their right to vote on account of their race or color. The record is full, and it shows that the century-and-a-half commitment of Mobile County to at-large school board elections is racially neutral and that blacks are not impeded in seeking school board positions and other Mobile County political offices. There is no occasion for any further proceedings on the merits. Upon reversal the case should be remanded to the district court

(footnote continued)

One of the more recent attempts to tabulate the number of city governments using at-large elections (based on 1972 data) concluded that 70% of cities conducting non-partisan elections use at-large elections; and almost half of all partisan elections held in cities larger than 10,000 are at-large. *See* Svara, *Unwrapping Institutional Packages in Urban Government: The Combination of Election Institutions In American Cities,* 39 J. Pol. 166, 168 (1977). Professor Svara found that 63% of all cities in the United States with a population greater than 10,000 used at-large elections, which he described as part of the "good government reform model" of city government.

with instructions to withdraw the remedial order it has entered and to take appropriate steps to undo what has already been done in furtherance of that order and thereby to reconstitute as promptly as possible a school board whose members are elected from Mobile County at large pursuant to the governing state statutes.

Respectfully submitted,

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December 1978

ADDENDUM

Act No. 229, Local Acts, 1919, of the State of Alabama, approved August 22, 1919

AN ACT

To further regulate the public school system of the county of Mobile by establishing a Board of School Commissioners for Mobile County, of five members, in the place and stead of the Board of School Commissioners of Mobile County, as at present constituted; which new board of five members shall have the same title and exercise the same rights, powers, duties and privileges as are now had and exercised by the Board of School Commissioners of Mobile County as at present constituted; and, to that end, to abolish the Board of School Commissioners of Mobile County as now constituted.

SECTION 1. ***Be it enacted by the Legislature of Alabama,*** That the Board of School Commissioners of Mobile County as now constituted and existing is hereby abolished.

SECTION 2. Be it further enacted that the Superintendent of Education of the State of Alabama, is hereby required to appoint as the members of the Board of School Commissioners of Mobile County which shall exist under this Act, five persons out of and from the Board of nine members as at present constituted. This said Superintendent of Education of the State of Alabama shall so appoint the members of the Board of School Commissioners to hold office under this act, as soon as is reasonably practicable after this Act shall have become law. Until the Superintendent of Education of the State of Alabama, shall have so appointed the new Board herein provided

for, the old Board of School Commissioners of Mobile County, being the Board as at present constituted, shall continue to hold office and administer the public school system in Mobile County.

SECTION 3. Be it further enacted that the Superintendent of Education of the State of Alabama shall make known his appointment of the five members who shall constitute the Board of School Commissioners of Mobile County under this Act, by a notice in writing to each of the five members and also by a formal proclamation addressed to the Board of School Commissioners of Mobile County. At once upon the giving, by the said Superintendent of Education of such notices, and the promulgation of such formal proclamation, the Board of School Commissioners of Mobile County, as at present constituted, shall forthwith cease to exist and the new Board of School Commissioners of Mobile County, under this Act, shall forthwith come into being.

SECTION 4. Be it further enacted that in appointing the five members of the Board of School Commissioners of Mobile County under this Act, here-in-before provided for, the Superintendent of Education of the State of Alabama, shall divide the said five members into three classes which shall be styled Class 1, Class 2, and Class 3, Class 1 shall consist of two members, Class 2 shall consit [sic] of two members and Class 3 shall consist of one member. The members in Class 1 shall hold office until the general election in 1920, and until their successors shall have been elected and qualified. The term of office of their successsors shall be six years. The members in Class 2 shall hold office until the general election in 1922 and until their successors are elected and qualified. The term of office of their successors shall be six years. The member in Class 3 shall hold office until the general

election in 1924 and until his successor shall be elected and qualified. The term of office of his successor shall be six years. So in every second year thereafter, at the general election in that year, there shall be elected by the people successors to the members of the Class whose term of office is then expiring. The term of office of the Commissioners elected by the people at the general elections under this Act, shall be six years.

SECTION 5. At the general election in 1920 the successors to the two members of Class one, and at the general election in 1922 the successors to the two members of Class two, and at the general election in 1924, the successors to the one member of Class three, shall be elected by the voters of the county at large.

SECTION 6. Be it further enacted that the Board of School Commissioners of Mobile County as established under and by this Act shall have the same title as the present Board to-wit, Board of School Commissioners of Mobile County, and shall have and exercise all the rights, powers, duties and privileges that are now held and exercised by the Board of School Commissioners of Mobile County as now constituted, the whole purpose of this Act being the creating, of a Board containing five members in lieu of a Board containing nine members, and otherwise not to disturb or in any way affect the body of existing law regulating and governing the system and conduct of public schools in Mobile County, except as expressly set out in this Act as necessary to make harmonious the present Act with the said body of the existing law.

SECTION 7. Be it further enacted, that three members shall constitute a quorum at any meeting of the Board of School Commissioners established by and under this Act, whether such meeting be a special, general or regular

meeting, and any and all acts taken by a quorum in the name of the Board, shall be valid and binding as fully as if taken at a meeting having present the entire membership; provided, however, that no business involving a change in the system, rules or regulations or affecting the general interest of the county shall be transacted except at the regular meeting after due notice given, or when a full Board is in attendance; and provided further that the provisions of already existing law, requiring unanimous action of the Board, or action by the full Board, in certain stated contingencies, are not by this Act changed or altered but remain in full force and effect.

SECTION 8. Be it further enacted that all laws and parts of laws in conflict herewith are hereby expressly repealed.

Approved August 22, 1919.

Supreme Court, U. S.
FILED
FEB 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-357

ROBERT R. WILLIAMS, *et al.*,

Appellants,

v.

LEILA G. BROWN, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR APPELLEES

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978
No. 78-357

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN, et al.,

Appellees.

On Appeal From The United States Court
of Appeals For The
Fifth Circuit

BRIEF FOR APPELLEES

QUESTIONS PRESENTED

1. Did the at-large system for electing the Mobile school board violate section 2 of the 1965 Voting Rights Act?

2. Should this Court overturn the concurrent findings of fact of the two courts below that the at-large system for electing the Mobile school board is maintained and operated for the purpose of discriminating against black voters?

3. Should this Court overturn the concurrent findings of fact of the two courts below that the at-large election system for electing the Mobile school board operates "to minimize or cancel out the voting strength" of blacks in violation of White v. Regester, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971)?

4. Did the at-large system for electing the Mobile school board violate the Fifteenth Amendment?[1/]

1/ In their Jurisdictional Statement appellants presented a question regarding the remedy ordered by the district court. As was more fully set out in their Application for Stay, pp. 5-6, appellants complained because the single-member district elections were to be phased in over several years, rather than all beginning in 1978. As was noted by the district judge, the phasing in of single-member district elections had been sought by the appellants in the district court and defended by them in the court of appeals. The district court opinion of November 20, 1978, is set out in the Appendix to this brief, pp. App. 1a-19a; see App. 11a-12a. Appellants have apparently abandoned this issue in their brief.

STATEMENT

The complaint in this action was filed on June 9, 1975, alleging that the at-large system for electing the Mobile County Board of School Commissioners violated the Fourteenth and Fifteenth Amendments and section 2 of the 1965 Voting Rights Act. J.S. 75a. On October 10, 1975, the Alabama Legislature adopted an act providing for the use of single-member districts in the election of the Mobile school board. The defendant school commissioners then asked that the action as against them be dismissed as moot, and the district court did so on November 21, 1975.

On February 5, 1976, the school commissioners brought a state court action challenging on state constitutional grounds the new single-member district plan. They named as defendants only the same election officials who were their co-defendants in the federal action, and those election officials declined to defend the validity of the single-member district plan. The state court ruled for the school board and invalidated the single-member district plan on February 17, 1976.

On March 8, 1976, the federal district court granted plaintiffs' motion to rejoin the school commissioners in this action. The commissioners declined to file an answer until July 12, 1976, and filed unsuccessful motions to postpone the trial on July 6, 1976, July 12, 1976, September 2, 1976, and September 9, 1976. The action was tried on Septemer 9-17, 1976. On December 9, 1976, the district court held that the at-large system was unconstitutional because it impermissibly nullified the votes of black voters in Mobile and because the system had been maintained by the Legislature with "a present purpose to dilute the black vote". J.S. 37b; A. 34a. The court of appeals affirmed in a per curiam opinion on July 2, 1978. J. S. 1a-2a; A. 1a-2a. Probable jurisdiction was noted on October 30, 1978.

On September 5, 1978, pursuant to the single-member district plan ordered into effect by the district court, black candidates won the primary elections in two of those districts. On October, 1978, Mr. Justice Powell entered an order staying the holding of the general elections in those districts, 47 U.S.L.W. 3314, but on October

31, 1978, Justice Powell vacated that stay on the ground, inter alia, that the appel lants had failed to disclose that the general elections were uncontested. 47 U.S.L.W. 3324.

On October 11, 1978, the outgoing all-white commissioners voted to impose on the incoming board a requirement that no existing school policy could be changed except by a vote of four to one. Since the new board has three whites and two black members, the effect of this rule was to guarantee that no policy could be changed without the approval of a majority of the white commissioners. On November 24, 1978, the district court invalidated this new rule, holding that it was intended to disenfranchise the newly elected black school commissioners and to frustrate the court's previous orders.

SUMMARY OF ARGUMENT

I. Section 2 of the 1965 Voting Rights Act prohibits the use of election practices which "deny or abridge the right . . . to vote on account of race or color." This should be construed in pari materia with section 5 of that Act,

which forbids certain jurisdictions to use new election practices which will have the "purpose . . . or . . . effect" of so denying or abridging the right to vote. Both sections are concerned with the same type of denial or abridgement; section 5 merely establishes special procedures for reviewing new practices in particular states and subdivisions.

The meaning of the Act as applied to districting plans is well established. Blacks cannot be subjected to a districting system which would "nullify their ability to elect the candidate of their choice." Allen v. Board of Elections, 393 U.S. 544, 569 (1969). The courts below correctly found that Mobile's at-large election system operated in just that manner.

II. The district court found that the at-large system has been retained by Alabama for the purpose of diluting black votes. The record before the district court included uncontradicted testimony by members of the state legislature that hostility to the election of black local officials is a paramount consideration in the opposition to legislation to alter election plans from

at-large to single-member districts. There is a long history of intentional discrimination by Alabama officials against black voters, and at-large plans adopted by the legislature for electing the state House and officials of other cities have been invalidated by other court decisions as racially motivated.

The record also showed, and the district judge found, that state officials had sought to interfere with any prompt judicial resolution of this case by procuring the introduction or passage of deliberately defective state legislation purporting to create single-member districts. In 1975 the defendants obtained dismissal of this action on the ground that it had been mooted by the adoption of such a legislative plan and then promptly attacked the validity of that plan in an undefended state court action. In 1976, after being rejoined as parties, the defendants procured the introduction in the Legislature of a second single-member district bill, and repeatedly asked that this case be stayed or dismissed because of the pendency of this second bill. The defendants insisted in support of these motions that the bill was valid, but after their motions were rejected

they conceded that they actually believed that the bill would have violated state constitutional requirements. This palpable bad faith on the part of the board members, who by their own admission exercised effective control of the Legislature's decisions, supported the district court's conclusion that the failure of the Legislature to enact a valid single-member district plan was racially motivated.

III.A. In our brief in City of Mobile v. Bolden, No. 78-1844, we set out our analysis of White v. Regester, 412 U.S. 755 (1973), showing that White precludes the use of a multi-member district system which so maximizes the weight of a bloc-voting white majority that the votes and electoral preferences of the non-white minority are consistently nullified. We there urge that such a system is the functional equivalent of one in which white voters reside in a district with an excess number of representatives and black voters live in a district with no representatives at all.

White bloc voting is not, as appellants suggest, an "unfortunate practice" of no constitutional significance, but the keystone of a White v. Regester violation. Here white bloc voting has its roots in a century of racial discrimination openly practiced and advocated by Alabama public officials. In Mobile that bloc voting is deliberately inflamed and manipulated by white candidates, many of them incumbent public officials. Campaign leaflets and advertisements pointedly display photographs of black opponents and attack white opponents for having received the votes of blacks.

B. The courts below correctly found that Mobile's at-large election system operates to effectively disenfranchise black voters. The evidence showed, and the district court found, that whites vote as a bloc against black candidates or white candidates who are supported by black voters, that no black has ever won any at-large election in Mobile, that no black candidate could do so under the present system, and that the all-white school board had discriminated against its black constituents.

Appellants contest only the district court's finding that the school board was unresponsive to the interests of the black community. They do not deny that the board members intransigently refused to desegregate the de jure school system until threatened with personal fines of $1,000 a day, but urge that since then the attitude of the board has changed. The district court, however, found no such change, and in more recent years the board has been subjected to federal court decrees for improperly hiring and assigning faculty and staff on the basis of race, for expelling large numbers of black students, and for trying to disenfranchise newly elected black members of the board.

The record in this case contains the same evidence deemed sufficient to establish a constitutional violation in White. The district court's finding of such a violation, resting on "a blend of history and an intensely local appraisal of the design and impact of the [Mobile] multimember district in the light of past and present reality, political and otherwise", 412 U.S. at 769-70, should be upheld.

IV. The Fifteenth Amendment prohibits the use of election systems "which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race." Lane v. Wilson, 307 U. S. 268, 275 (1939). Lane does not require any showing that such barriers are racially motivated. In view of the fact that the Fifteenth Amendment singles out the franchise for special protection, a broader standard should be applied to election laws burdening blacks than under the general prohibition against racial classifications contained in the Fourteenth Amendment.

ARGUMENT

I. THE AT-LARGE SYSTEM FOR ELECTING THE MOBILE SCHOOL BOARD VIOLATES SECTION 2 OF THE 1965 VOTING RIGHTS ACT

The complaint in this action alleges that the at-large system for electing the Mobile School Board violates section 2 of the 1965 Voting Rights Act. A. 75a. Section 2, codified in 42 U.S.C. §1973, provides:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color....

The district court noted the existence of this statutory claim, J.S. 2b-3b, but neither court below decided it. The practice of this Court, however, is to avoid the decision of constitutional issues if it is possible to resolve a case on non-constitutional grounds. Wood v. Strickland, 420 U.S. 308, 314 (1975); Spector Motor Co. v. McLaughlin, 323 U.S. 101, 105 (1944).

The district court correctly held that section 2 establishes a private cause of action. A. 83a and n.2. Section 3 of the Voting Rights Act, which originally authorized certain special remedies[2/] in actions brought by the Attorney General under statutes protecting the right to vote, was amended in 1975 to make those remedies available as well in actions under any

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2/ These remedies include the appointment of federal examiners to register voters, the suspension of "tests or devices", and judicial or administrative pre-clearance of new voting laws.

federal voting statute brought by an "aggrieved person". 42 U.S.C. §1973a. The purpose of that amendment was to "allow a court, in a suit brought by a private party, to grant the Act's special remedies". S. Rep. No. 94-295, 94th Cong., 1st Sess., pp. 39-40, 49. The proponents of this amendment made it clear that they understood such a private action was available under section 2, and that section 3 remedies could thus be provided in private section 2 actions.[3/]

In our brief in City of Mobile v. Bolden, No. 77-1844, we set out at length our contention that section 2 prohibits election practices with certain discriminatory effects, including an at-large election system that "create[s] or enhance[s] the power of the white majority to exclude Negroes totally from participating in the governing of [a school board] through membership on the [board]". See City of Richmond v.

3/ Congressman Drinan, for example, noted that private actions could be "based ... upon statutes pursuant to [the Fourteenth and Fifteenth Amendments], such as 42 U.S.C. §1971, 1973, 1983." 121 Cong. Rec. H4734 (Daily ed. June 2, 1975).

United States, 422 U.S. 358, 370 (1975); Brief for Appellees, No. 77-1844, pp. 11-17. We there explain that the permanent prohibitions of section 2 and the temporary pre-clearance procedures of section 5 of the Voting Rights Act establish the same substantive standard but different procedures. As Senator Scott of Virginia noted:

> Substantially all the rights that are in the temporary legislation are in the permanent legislation of the Voting Rights Act. The principal difference refers to the burden of proof. Under the permanent provision of the law, the Government must prove its case. Under the temporary provision of the law there is a presumption of wrongdoing that has to be overcome by the state covered by the temporary provisions.4/

The record and findings in this case, which we set out in detail infra at pp. 43-48, demonstrate that the at-large system for electing the Mobile school board had just such an impact. The system placed 103,000 blacks in a district with 214,000 whites, J.S. 6b, enabling the whites

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4/ 121 Cong. Rec. S135499 (Daily ed. July 24, 1975); see also id. S13601 (remarks of Sen. Scott) (section 2 is the permanent provision referred to), S13376 (remarks of Sen. Brock) (section 5 establishes a different "procedure" than exists in non-covered jurisdictions).

by bloc voting to exclude from the school board not only blacks but even whites who had revealed an interest in serving the needs of the black community. This evidence was sufficient to meet plaintiffs' burden of establishing a violation of section 2 of the Voting Rights Act.

II. THE AT-LARGE SYSTEM FOR ELECTING THE MOBILE SCHOOL BOARD IS MAINTAINED AND OPERATED FOR THE PURPOSE OF DISCRIMINATING ON THE BASIS OF RACE

Although the Jurisdictional Statement and Brief for Appellants deal primarily with the application of the dilution rule of White v. Regester, 412 U.S. 755 (1973), the at-large election system was also invalidated below based on a finding of discriminatory intent. The district court found "a present purpose to dilute the black vote....", J.S. 37b; A. 34a (emphasis added), and the court of appeals upheld the district court's findings as "not clearly erroneous". J.S. 2a; A. 2a. The constitutional prohibition against such racially motivated laws is well established, and its application presents a largely factual issue. This Court does not ordinarily "undertake to review concurrent find-

ings of fact by two courts below in the absence of a very obvious and exceptional showing of error." Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949). Appellees maintain that no such unusual circumstances are present here.

The method for electing each school board in Alabama is fixed by state legislation. That method varies in a crazy-quilt pattern across the state; at least 11 different systems are presently in use.[5/] The Legislature frequently alters the method of electing the boards in particular counties; from 1975-1977, for example,

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5/ These include (1) five board members elected at-large with no residency requirement, as in Mobile County prior to this action, cf. Ala. Code §16-8-1 (1975); (2) five members elected at-large, but excluding residents of areas with independent boards of education, see e.g., Ala. Acts, 1977 Reg. Sess., No. 355 (Houston County); (3) five members elected at-large, but only one may live within the jurisdiction of an independent city board, see e.g., Ala. Acts, 75 Reg. Sess., No. 645 (Jefferson County); (4) seven at-large members, at least two of whom must not reside in a municipality, see e.g., Ala. Acts, 1939 Reg. Sess., No. 222 (Montgomery County); (5) seven at-large members from residency district, see e.g., Ala. Acts, 1971 Reg. Sess., No. 60 (Etowah County); (6) five at-large members from

the system was changed in five counties.[6/] The Mobile system, which predates the adoption of the 1965 Voting Rights Act,[7/] provides for the at-large election of all members of the board. Appellees contend, and the district court found, that Mobile's system is being maintained because of a "present purpose" to discriminate against

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5/ Cont'd

residency districts (excluding cities with independent boards), see e.g., Ala. Acts, 1973 Reg. Sess., No. 316 (Blount County); (7) one at-large plus four at-large from residency districts, see e.g., Ala. Acts, 1971 Reg. Sess., No. 2268 (Autauga County); (8) one at-large plus four single-member districts, see e.g., Ala. Acts, 1977 Reg. Sess., No. 254 (Chambers County); (9) seven members from single-member districts, see e.g., Ala. Acts, 1976 Reg. Sess., No. 380 (Morgan County); (10) five members from single-member districts, see e.g., Ala. Acts, 1936 Reg. Sess., No. 91 (Marion County); (11) four members from single-member districts, see e.g., Ala. Acts, 1967 Reg. Sess., No. 298 (Cleburne County).

6/ Jefferson, Chambers, Morgan, Houston, Geneva.

7/ There is some dispute as to what legislation established the present system. See J. S. 27b, A. 26a. In our view it is not necessary to determine when the system was created, since the district court correctly found it is being maintained for a discriminatory purpose.

black voters and to prevent the election of black members of the board. The record fully supports the findings below.

The district court found that race is a paramount consideration when the Legislature passes on any proposal to alter the method of electing state or local officials:

> The evidence is clear that whenever a redistricting bill of any type is proposed by a county delegation member, a major concern has centered around how many, if any, blacks would be elected. These factors prevented any effective redistricting which would result in any benefit to the black voters passing until the State was redistricted by a federal court order. J.S. 35b-36b, A. 33a.

This direct evidence of racial motivation, based on the uncontradicted testimony of members of the Legislature,[8/] was "highly relevant". Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 268 (1977).

The district court noted that the undisputed impact of the at-large system in Mobile was to preclude the election of any black to the school

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8/ A. 233a-234a, 267a-269a, 309a-311a, 405a-406a.

board.[9/] There was direct evidence that this discriminatory impact of at-large systems was well known to the Legislature[10/] and to the members of the Mobile school board.[11/] Such proof that the system bore "more heavily on one race than another" was also a strong indication of discriminatory intent. Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. at 266.

The district court properly relied as well on the long history of discrimination in Alabama against black voters.[12/] We have described that

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9/ J.S. 10b, 12b, 13b, 40b; A. 12a, 13a, 14a, 15a, 37a.

10/ See n.44, infra.

11/ Commissioner Alexander testified:

> A [I]n my opinion, a black could not be elected at this time on a county-wide basis.
>
> Q. Have any of the other school commissioners agreed with that position on the record?
>
> A. I would say that they generally agree with that, yes sir.

A. 372a.

12/ J.S. 9b, 19-21b, 43b; A. 11a, 20a-21a, 39a.

history at length in our brief in City of Mobile v. Bolden. Brief for Appellees, No. 77-1844, pp. 25-33. The use of at-large election systems to dilute black votes has been a major discriminatory tactic in recent years in Alabama. Id. pp. 31-32. This "series of official actions taken for invidious purposes" was also relevant under Arlington Heights, 429 U.S. at 267.

This evidence was compounded by two incidents which led the district judge to conclude that the defendants had acted with unclean hands.

The first such scheme involved the "Kennedy Bill",[13] a measure that had originally been proposed prior to the commencement of this action. A. 36a. The Kennedy Bill mandated the use of single-member district elections for the Mobile school board. The members of the board offered to support the Kennedy Bill provided that a single seemingly innocuous change was made.[14] At

13/ H.1243, Ala. Reg. Sess. (1975).

14/ A. 234a-35a, 379a-382a.

the board's insistence the dates on which the new single-member districts were to be phased in were altered, and with that modification the bill was passed and signed into law on October 10, 1975.[15] Although they were in close contact with the Legislature, the board members never expressed any doubts about the validity of the Kennedy Bill.[16] Shortly after the bill became law the defendant board members requested that the instant action be dismissed as against them[17] on the grounds it was moot.[18] The plaintiffs acquiesced in this request, and the school board claims were dismissed without prejudice on November 21, 1975. A. 80a.

On February 7, 1976, less than two and a half months after the school commissioners had obtained dismissal of this federal action on the

15/ Ala. Acts, 1975 Reg. Sess., No. 1150.

16/ A. 384a-385a.

17/ The complaint also challenged the use of at-large elections to choose the County Commission. This aspect of the case remained unaffected.

18/ Tr. 865.

ground that the Kennedy Bill had enacted single-member districts, the same school board commissioners brought a state court action attacking the validity of the Kennedy Act. The state court action was not a meaningful adversary proceeding. The federal plaintiffs were not named as parties or served with the complaint. The only named defendants were the Sheriff, Circuit Clerk and Probate Judge of Mobile County, who were also defendants in the federal action.[19] Thus the state action was a proceeding between the federal defendants to determine the validity of the relief obtained by members of the federal plaintiff class through legislative action. The defendant Sheriff, Circuit Clerk and Probate Judge appeared in the state action but took no position on the merits;[20] the Alabama Attorney General who was

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19/ The complaint and judgment in the state court action, Board of School Commissioners of Mobile County, Alabama v. John L. Moore, Civil Action No. 96,204, are in the record in this case, annexed to plaintiffs' Motion to Add Parties Defendant. See A. 88a.

20/ Their Answer admitted all allegations of the Board's complaint except its conclusion that the single-member plan was invalid, and as to that

also served never appeared at all. A. 240a.

The gravamen of the school board's state court complaint was that the language of the Kennedy Act as finally adopted differed from the language of the Bill as originally advertised in Mobile. This was claimed to violate a state constitutional requirement that such "local laws" be advertised prior to passage. But the board objected to the very change in language which the board itself had demanded, the alteration of the dates for implementing single-member district elections.[21] The state court entered judgment in

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20/ Cont'd

conclusion asserted only that the "defendants are without sufficient knowledge to admit or deny the allegation...." Answer, p. 1. The state court defendants filed no other pleadings, briefs, or other papers.

21/ In support of its action the board filed an affidavit of George E. Stone, Jr., Director of Legal Services of the Mobile County School System, dated February 12, 1976. The affidavit asserted there was a "substantial difference of substance between the published notice and Act No. 1150 as enacted by the Legislature. The Bill of which notice by publication was given creates

favor of the school board holding the Kennedy Act invalid on February 17, 1976, twelve days after the state court action was commenced. None of the nominal defendants in that action appealed. J.S. 22b-23b; A. 23a.

On March 1, 1976, the federal plaintiffs moved to rejoin the school commissioners as defendants, a motion which the district judge promptly granted. A. 65a, 88a-89a. Although the commissioners were thus back in federal court, they had succeeded in delaying those proceedings

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21/ Cont'd

five geographic districts numbered one through five. It provides for the election of members of the Board from districts one, two and three in November 1976 to take office in January, 1977 and for election of members from districts four and five to be elected in November 1978 to take office in January 1979. Whereas, Act. No. 1150 as passed by the Legislature provides for the election of members from districts three and four in November 1976 to take office in January 1977, for the election of a member from district one in November, 1978 to take office in January 1979 and for election of members from districts two and five in 1980 to take office in January 1981. Thus, there is a substantial and material difference between the published notice of the bill that was to be introduced and Act No. 1150 as passed by the Legislature." P. 5.

by over three months, which was probably sufficient to assure that the case could not be decided prior to the 1976 school board elections. The defendants guaranteed that result by refusing to file an Answer until July 12, 1976, A. 95a-99a, 106a, 118a, and then filed four motions for continuances prior to the September 1976 trial. A. 92a, 100a, 144a, 166a.

Following their joinder as defendants, the school commissioners prepared a second bill. This new proposal was cast as a "general law of local application", a form of legislation which does not require any advertisement under the Alabama Constitution. The commissioners asked black Representative Gary Cooper to introduce this measure, but Cooper, suspicious of the board's motives, refused to do so. Tr. 400-01. On July 8, 1976, white Representative Nat Sonnier, acting for the defendants, introduced the bill. A. 101a-102a, 146a. Four days later the defendants moved to delay further proceedings in this action because of the pendency of the "Sonnier Bill"[22/]

22/ H.1060, Ala. Reg. Sess. (1976).

A. 100a. The defendants repeatedly insisted they favored the use of single-member districts, referred to the fatal defect of the Kennedy Act as "unfortunate",[23] and stated they were doing all they could to obtain enactment of the Sonnier Bill.[24] The requested continuances were denied.

In view of the misuse of the Kennedy Act by the school board, legislative proponents of single-member districting opposed the Sonnier Bill, fearful that it too was a contrivance to perpetuate the at-large system. Representative Cooper explained:

> I felt that it was a ploy being used by the Mobile County School Board so that they could come back and tell the Judge here in Mobile that we were trying to get a bill passed. Of course, we knew that if the bill passed . . . it could be challenged, and it would mean another two or three years before any result could come to this problem. A. 272a.

23/ A. 101a, 115a.

24/ A. 101a, 111a, 115a, 145a-146a, 168a, 172a-173a, 178a, 179a.

Representative Cooper expressed reservations about whether, in light of the special state constitutional status of the Mobile school board, it could be redistricted by a general law of local application. A. 238a-239a, 249a-251a. The defendants then made repeated motions to dismiss this action, claiming the plaintiffs did not have "clean hands" because the Sonnier Bill was being blocked by black legislators allegedly acting on behalf of the plaintiffs. A. 144a-148a, 168a-172a. These motions were denied.

In connection with these motions for continuances and dismissal, a question naturally arose about whether the Sonnier Bill would be valid under state law. Counsel for plaintiffs were concerned that it too was deliberately defective, and that the board would attack the legality of the Sonnier Bill, as it had the Kennedy Bill, once dismissal or delay of the federal action had been achieved. The defendants, however, insisted in their September 2, 1976, motion that the Sonnier Bill would meet "all constitutional standards", A. 148a, and offered proposed Findings of Fact and Conclusions of Law stating the bill was "constitutionally sound". J.S. 25b; A. 25a. Counsel for

the school board, at the September 9, 1976, hearing on the last motion for dismissal or continuance, unequivocally insisted that the Sonnier Bill "would have met all constitutional tests and requirements" and "would meet every Constitutional test". A. 171a, 173a. Once these motions were denied and the case went to trial, counsel for the board took precisely the opposite position. In urging that Mobile's at-large system was of long standing, counsel for the board contended it dated from a 1919 statute, not a more recent 1939 law, because the latter was a "general law of local application" and such laws could not constitutionally apply to Mobile. The district judge realized that the Sonnier Bill had also been a general law of local application, and counsel for defendants asserted that it too would have been invalid.

> THE COURT: So, if that is true an Act passed as a general Act ... would be unconstitutional?
>
> MR. PHILIPS: I think it would.
>
> THE COURT: So, the proposed Act this last time was, therefore, unconstitutional?
>
> MR. PHILIPS: I think it was.

> THE COURT: Okay.
>
> MR. PHILIPS: There never was any doubt in my mind about that.

A. 441a-442a (emphasis added). This was the same attorney who had represented at the beginning of trial that the Sonnier Bill was valid and thus justified dismissal of this action.

In the face of these inconsistent representations the district judge found that the defendants were acting with unclean hands; the board's tactics, he wrote, were similar to their "lack of cooperation and dilatory practices" in obstructing school desegregation. J.S. 26b; A. 26a. The district court later noted that the purpose of "the defendants' different positions on legislative proposals to provide for single-member district[s] . . . ha[s] been to delay and defeat their alleged support of the legislative actions".[25/] This palpable attempt to perpetrate yet another ruse on the federal court was of obvious importance in assessing the motives

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25/ Appendix to this brief, App. 12a-13a.

underlying the maintenance of the at-large system.[26/]

The state officials whose decisions produced the deliberately defective legislation of 1975 and 1976, and who controlled the Legislature's failure to enact single-member districts before or after that period, were the defendant school commissioners, and thus it is their motives which are critical. Under the "courtesy rule" in force in the Alabama legislature, responsibility for any legislation affecting only Mobile was left entirely in the hands of the Mobile County legislative delegation, J.S. 35b; A. 32a-33a. In this instance the delegation was acting at the behest of the defendant school board members and the board itself insisted it could control the passage

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26/ A. 169a, 172a-173a. Regrettably such tactics did not end after the trial of this action. In this Court, for example, the appellants attacked the schedule for phasing in the use of single-member districts even though they had sought such a schedule in the district court and defended it in the court of appeals. App. 11a-12a. The appellants also sought to disenfranchise any new black members of the school board by requiring a vote of 4 to 1, and thus a majority of the white members, to alter any existing policy. App. 7a-9a, 13a-14a. "App." citations refer to the Appendix to this brief.

of school board redistricting legislation.[27/] For federal constitutional purposes the members of the Mobile school board are state officers as much as are the members of the state Legislature. The bad faith of either fatally taints any resulting legislation. Cf. Cooper v. Aaron, 358 U. S. 1 (1958).

The appellants do not question or address any of these findings. They attack the finding of purposeful discrimination on somewhat different grounds.

The only portion of the Brief for Appellants dealing directly with this issue asserts that the at-large system did not originate as a "device to discriminate". Brief for Appellants, pp. 60-61. But appellees' contention and the finding below are that the at-large system has been maintained in operation in order to disenfranchise blacks, and is thus tainted by "a

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27/ A. 148a, 172a-173a. Notwithstanding their repeated pretrial assertions of a desire to procure their own single-member disctrict plan in the Legislature, the defendants did not do so at the 1977 or 1978 sessions of the Legislature.

present purpose" to discriminate. J.S. 37b; A. 34a. If state officials continue a policy or practice for discriminatory reasons, that policy or practice is unconstitutional regardless of the motive which led to its original adoption. Arlington Heights itself recognized that a racially motivated decision to maintain the zoning classification of a particular lot would violate the Fourteenth Amendment regardless of the origin of that classification. 429 U.S. at 257-58, 268-71 n.17.

Appellants assert that "[p]laintiffs' challenge to the at-large manner of electing school board members was premised on the alleged effects of this system, not on its purpose". Brief for Appellants, p. 6. The complaint is phrased with sufficient breadth to encompass either claim. The defendants in the district court did not move for a more definite statement under Rule 12(e), F.R.C.P., and neither in this Court nor at any other stage in this proceeding have they suggested they were misled by the complaint. Plaintiffs' Proposed Pretrial Findings, filed several months prior to trial, made crystal clear that plaintiffs claimed the at-large system had a discriminatory motive; it asked the

trial court to find "that the State of Alabama, through its legislators and officers, has used the at-large system ... with an active motive or purpose to discriminate against the black citizens of Mobile",[28/] and that this was the "conscious legislative and political purpose in the maintenance of the current at-large election...."[29/] The district court expressly noted the existence of this claim. J.S. 5b; A. 8a.

Finally, appellants suggest that the court of appeals improperly equated proof of dilution under White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), with proof of discriminatory purpose. Brief for Appellants, pp. 36-42. This argument is grounded on a somewhat novel approach to reviewing a court of appeals decision. Not a word in the Fifth Circuit decision in this case even discusses the relation of White and Zimmer to proof of purpose. Appellants rely entirely on the following passage. "See Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978)." Brief for Appel-

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28/ Plaintiffs' Proposed Pretrial Findings, p. 26.

29/ Id. p. 29.

lants, p. 37. They suggest that this incorporates by reference not only all the reasoning of Bolden, but also the reasoning of "the three other cases that the court of appeals consolidated with Bolden". The only extended discussion of the relation between White and Zimmer and intent is to be found, not in Bolden, but in one of those consolidated cases, Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978), petition for cert. pending No. 78-492. Nevett, which was not cited or relied on by the panel below, holds only that "under proper circumstances" evidence sufficient to establish dilution might also be sufficient to establish a prima facie case of intentional discrimination. 571 F.2d at 223. What those circumstances might be Nevett did not, and this Court need not, decide. It seems somewhat far-fetched to read into the opinion below an error on an issue which it never discussed because it cited Bolden, which in turn cited Nevett, which in turn recognized but did not decide that issue. We suggest that the court of appeals cited Bolden merely as an illustration of another finding, based on similar direct and circumstantial evidence, of "a present purpose to dilute the black vote" resulting in

"intentional state legislative inaction". Bolden v. City of Mobile, 571 F.2d at 246.

This aspect of this case thus presents no legal issues of broad implication. It rests on a factual finding, of relevance to this case alone, that Alabama has chosen to maintain at-large elections for the Mobile school board, rather than use single-member districts, because of "a present purpose to dilute the black vote...." J.S. 37b; A. 34a. The record on which that finding was based contains precisely the sort of evidence contemplated by Arlington Heights: direct testimony about the motives of the Legislature, a widely known adverse impact on black voters and candidates, a long and closely related history of intentional discrimination, and palpable bad faith on the part of the white school commissioners who exercised effective control over whether and in what form a single-member plan would be adopted. The court of appeals correctly upheld the district court findings as not clearly erroneous, and the finding of discriminatory purpose should be upheld by this Court.

III. THE COURTS BELOW CORRECTLY APPLIED THE PRINCIPLES OF WHITE v. REGESTER AND WHITCOMB v. CHAVIS

A. The Legal Standard Established By White and Whitcomb

In our brief in City of Mobile v. Bolden we discuss at length the origin and rationale of the dilution rule of White v. Regester, 412 U.S. 755 (1973), and Whitcomb v. Chavis, 403 U.S. 124 (1971). We there urge that a plaintiff may prove a constitutional violation comparable to geographic malapportionment by demonstrating that the overall structure of a multi-member district system operates to so maximize the weight of a bloc voting white majority that the votes and electoral preferences of the non-white minority are consistently nullified. Brief for Appellees, No. 77-1844, pp. 37-53. That brief sets out in detail our arguments that proof of discriminatory motive is not necessary under White and Whitcomb, id., pp. 53-61, and that those decisions are not limited to cases of a white-dominated slating process. Id., pp. 45-48.

Appellants in the instant case urge that white bloc voting against black candidates and black interests is merely an "unfortunate practice" of no particular constitutional signifi-

cance, relying on the opinion of three members of this Court in United Jewish Organizations v. Carey, 430 U.S. 144 (1977). Brief for Appellants, p. 43. Prior decisions of this Court, however, make clear that white bloc voting is the keystone of a dilution case under White and Whitcomb.[30/] UJO expressly noted that it is only when voting "follow[s] racial lines" that a voter is injured by being placed in a district dominated by another race. 430 U.S. at 166, n.24. The opinion in UJO holds that under the circumstances of that case proof of bloc voting did not establish a cause of action. 430 U.S. at 166-67. But there white voters, who constituted 65% of the county population, were challenging a plan which left white majorities in 70% of the districts. The opinion held that the election of black candidates in the other 30% of the districts of because of black bloc voting would not violate the constitutional rights of whites "as long as whites in Kings County, as a group, were provided with fair representation." 430 U.S. at 166. That

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30/ See Brief for Appellees, No. 77-1844, pp. 40-45.

system was precisely the opposite of the system in the instant case, which provides the 35% black population with 0% of the representation.

This case, moreover, provides no occasion for examining all the varieties of voting patterns that might be characterized as "bloc voting". It concerns only the specific harsh realities of Mobile, Alabama. As we set out at length, infra, the record shows and the district court found that whites vote as a bloc not only against any black candidate regardless of qualification, but also against any white candidate who is known to have black support. See pp. 44-45, infra. This practice, far from fading away, has become increasingly virulent; the defendants' own expert concluded that white hostility to black voters, interests and candidates in Mobile had increased since 1960, and that "while the numbers of blacks voting in Mobile has increased sharply since 1960, the power of blacks to positively influence elections has decreased."[31/] Plaintiffs expressly

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31/ A. 502a; see also A. 472a, 500a.

alleged that the white bloc voting was the result of officially practiced and advocated racial discrimination by Alabama authorities, A. 127a, and the district judge apparently shared that view.[32/] The differing abilities of black candidates to win white votes in Mobile and Massachusetts have their roots in differences in past official policies and practices.

White bloc voting in Mobile, moreover, does not linger inexplicably; it is deliberately and expressly encouraged by white officials and candidates. The campaign advertisements reproduced at pages 523a to 536a of the Appendix, all used within the last decade, overtly seek to inflame racial passions. Not only do white candidates circulate leaflets which pointedly display photographs of their black opponents,[33/] but they also place photographs of blacks next to photographs of their white opponents to "illus-

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32/ "The racial polarization existing in the city and county elections has been discussed herein. The court finds that the existence of past discrimination has helped preclude the effective participation of blacks in the election system today in the at-large system of electing school commissioners." J.S. 21b; A. 21a.

33/ A. 403a-404a.

trate" the nature of the opponent's support. A. 523a, 533a, 536a. Cf. Anderson v. Martin, 375 U.S. 399 (1964). Whites are consistently attacked for receiving what is euphemistically described as "the bloc vote",[34/] and advertisements in runoff elections emphasize the support won by opponents in "predominantly black wards". A. 524a (emphasis in original).[35/] In the 1972 school board election, Homer Sessions, then an incumbent member of the school board and a defendant in this action, suggested his white opponent favored "racial amalgamation". A. 528a. Sessions' supporters circulated a leaflet, reprinted on the opposite page, denouncing that opponent for having "entertained blacks in her home" and having "been seen and photographed in company of black males." A. 523a. Candidates are entitled to attack their

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34/ A. 523a, 525a-526a, 531a, 534a.

35/ See also A. 523a, 525a-526a.

JOHN LeFLORE

GERRE KOFFLER

WHO WILL RUN YOUR SCHOOLS?

GERRE KOFFLER FACTS:

RUNNING FOR PLACE NO. 3, SCHOOL BOARD COMMISSION, MAY 30th.

1. SIGNED AGREEMENT WITH NAACP TO ACHIEVE TOTAL INTEGRATION WITH TOTAL BUSING.
2. VERY ACTIVE IN THE MILITANT ORGANIZATIONS ACT, NAACP, NOW, NON-PARTISAN VOTERS LEAGUE, LEAGUE OF WOMEN VOTERS.
3. HAS ENTERTAINED BLACKS IN HER HOME.
4. HAS BEEN SEEN AND PHOTOGRAPHED IN COMPANY OF BLACK MALES.
5. UNDER INSTRUCTION OF ALBERT J. FOLEY IN THE CIVIL RIGHTS SCHOOL CURRENTLY.
6. POLLED 92% OF BLACK VOTE IN MAY 2, PRIMARY.

	MAY 2 BLOCK VOTE			
WARDS	Koffler	Sessions	Langan	McConnell
3 STANTON ROAD	746	170	1,071	49
10 DAVIS AVE.	529	123	820	87
31 PLATEAU	270	22	282	10
32 TRINITY GARDENS	320	24	372	41

PLEASE VOTE MAY 30

OFFICIAL C. B. I. REPORT DATE LINED MOBILE, ALA.

opponents on any basis they may please, including that of race, but they are not entitled to have the state maximize the effectiveness of such racial tactics by means of at-large elections.

Appellants urge that different and less stringent dilution standards should be applied to at-large elections for a local government unit than for a state legislature. Brief for Appellants, pp. 64-69. This issue was never raised in the lower courts, and any opportunity to do so was abandoned long ago. Id., p. 64. We set out in our brief in City of Mobile v. Bolden our contention that White and Whitcomb are equally and fully applicable to local elections. Brief for Appellees, No. 77-1844, pp. 61-67.

Appellants suggest that there are particularly close and active relationships between the public and local elected officials. While that may be true in some towns, it is certainly not true in large urban areas. Mobile County, for example, with a population of 317,000, has a larger population than Alaska;[35/] 119 other

35/ In 1970 the population of Alaska was 304,000. Statistical Abstract, 1977, p. 11.

counties and 47 cities in the United States, are one larger than at least one state.[37/] The population of the Mobile at-large district is 10 times larger than an Alabama House district, 3 times larger than an Alabama Senate district, and larger than any single-member district used to elect legislators in almost any state in the country.[38/] The functions of local government bodies do vary widely, but some are certainly entirely legislative in nature. Even where those local bodies perform administrative functions as well, that hardly makes it less important that blacks have meaningful representation on the board or council involved.

B. The Application of White and Whitcomb To The Facts Of This Case

After an unusually detailed analysis of the evidence the district court concluded that:

37/ See United States Census, City County Data Book, 1972, pp. 800, 814.

38/ Of the 49 state senates and 50 state assemblies or houses, only the state senate districts in New York and California appear to exceed 300,000 in population.

> the at-large districts operate to minimize or cancel out the voting strength of racial or political elements of the voting population." Whitcomb, 403 U.S. at 143, and Fortson [v. Dorsey, 379 U.S 433,] 439, and 'operates impermissibly to dilute the voting strength of an identifiable element of the voting population. Dallas [v. Reese, 421 U.S. 477,] 480. J.S. 45b-46b; A. 41a.

The court of appeals expressly upheld this conclusion. J.S. 2a; A. 2a. These findings, which are essentially factual in nature, are fully supported by the record and should be upheld by this Court.

The district court found that there was racially polarized voting in Mobile; whites voted as a bloc, not only against black candidates, but against "any white candidate with a favorable vote in the black wards, or identified with sponsoring particularized black needs".[39/] It noted that this "white backlash" against black support had led to the defeat of white candidates. The record fully supported this finding of white bloc voting

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39/ J.S. 10b, 11b, 12b; A. 12a, 13a, 14a.

against both black candidates[40/] and white candidates connected with black voters or interests.[41/] Detailed analyses of election returns made by experts for both parties confirmed this pattern.[42/] The defendants' own expert described black support as the "kiss of death" for a white candidate.[43/] Appellants do not challenge this finding. Brief for Appellant, p. 13.

The district court also found that no black had ever won an at-large election in Mobile County for the school board, the city commission, the county commission, or the legislature, and that "it is highly unlikely that anytime in the forseeable future, under the at-large system, that a black can be elected against a white."[44/] The

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40/ A. 184a-191a, 229a, 240a, 243a, 256a, 261a, 272a-273a, 283a-284a, 285a-286a, 300a, 324a, 484a.

41/ A. 221a, 222a, 229a, 244a, 294a-295a, 297a, 301a, 302a, 305a, 320a, 364a-265a, 366a-368a, 411a, 417a, 418a, 492a, 498a-499a, 502a.

42/ A. 480a-484a, 488a, 504a-520a; P. Ex. 10-52.

43/ A. 492a.

44/ J.S. 10b, 12b, 13b, 40b; A. 12a, 14a, 15a, 37a.

court noted that four "well educated and highly respected" blacks had run for the Mobile school board, including two doctors, J.S. 10b, and a former president of the state P.T.A. A. 328a-30a. "They all received good support from the black voters and virtually no support from whites. They all lost to white opponents in runoff elections."J. S. 10b; A. 13a. Both black and white Mobile politicians, including the defendant school board president, testified that no black could be elected under the at-large system.[45/]

The district court further found that Alabama had a long history of officially practiced and advocated racial discrimination against potential black voters,[46/] precisely the sort of history likely to engender racial bloc voting by whites. The record fully supports this finding,[47/] and

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45/ A. 230a-231a, 231a-232a, 272a-273a, 308a-309a, 321a, 325a, 340a-341a, 355a, 359a-360a, 369a-370a, 378a. The testimony of defendant Alexander is quoted supra, p. 19. See also A. 406a-407a.

46/ J.S. 19b-21b, 43b; A. 20a-21a, 39a.

47/ A. 195a-203a, 207a-210a. That history is set out at length in the Brief for Appellees in City of Mobile v. Bolden, No. 77-1844, pp. 25-33.

appellants concede its correctness.[48/]

The district court also noted the existence of several election rules not essential to at-large elections that aggravated the dilutive effect of Mobile's at-large system. The system, like that in White v. Regester, includes majority runoff and numbered place requirements,[49/] which "enhanced the opportunity for racial discrimination" by precluding the election of a black based on a mere plurality. White v. Regester, 412 U.S. at 766. Also, as in White, there was no residence requirement, so that "all candidates may be selected from outside the Negro residential area". White v. Regester, 412 U.S. at 766 n.10. Appellants acknowledge the correctness of this finding.[50/]

The district court found that the "at-large county board members have not been responsive to the minorities' needs",[51/] as might have

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48/ Brief for Appellants, p. 49.

49/ J. S. 21b-22b, 44b-45b; A. 22a, 39a-40a.

50/ Brief for Appellants, pp. 44-45 n.21.

51/ J. S. 13b; A. 15a.

been expected where the election system effectively disenfranchises blacks. The court relied in particular on the school board's prolonged and obstinate refusal to dismantle its de jure segregated school system. Desegregation only occurred under court order after extended litigation, including 15 appeals, in Davis v. Board of School Commissioners of Mobile County.[52] The district court held:

> The lengthy record in Davis, supra, is devastating evidence of the complete unresponsiveness and resistance on the part of the Board to the particular needs and aspirations of the black communty.
>
> The record ... is replete with dilatory actions by the Board attempting to forestall implementation of a desegregated school system.... [T]he Board adamant[ly] refus[ed] to respond voluntarily to black community interests and the prevailing law of the land.[53]

The Board had refused to acknowledge that its concededly segregated system was unconstitutional, had withheld from the courts information necessary to resolve the litigation, and had con-

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52/ Civil Action No. 3003-63-H, S.D. Ala.

53/ J.S. 14b, A. 15a-16a.

sistently disobeyed federal court decrees.[54] On appeal of the instant action in 1977, the board defended its conduct between 1963 and 1970 with an apparent reliance on Plessy v. Ferguson, 167 U.S. 537 (1896); they urged that "the manner of operation declared unconstitutional was, until a particular decision of the Supreme Court, fully constitutional and supported by a prior line of decisions of the Court".[55]

The appellants challenge this finding of unresponsiveness, characterizing Davis as "unrelated litigation". Brief for Appellants, pp. 50-51. We submit there is no form of unresponsiveness more relevant to a case such as this than the refusal of an all-white school board to permit a black child, because of his or her race, to attend a de jure all-white school. In this case those school officials persisted in that intransigent behavior 15 years after Brown v. Board of Education, 347 U.S 483 (1954), and

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54/ J.S. 16b-18b; A. 16a-18a.

55/ Brief for Defendants-Appellants, No. 77-1583, 5th Cir., pp. 38-39.

aggravated it by the assignment of faculty on the basis of race. Appellants object that the last specific order in Davis cited by the district court was in 1970. Brief for Appellants, p. 51. This is correct but misleading. In 1972 the school board summarily expelled a large number of black high school students, and only agreed to reinstate them after being again sued in federal court.[56] When the instant case was tried in 1976, as the district court noted,[57] proceedings in Davis were still pending in the district court. Those proceedings resulted in a decision by Judge Hand in 1977 finding that the school board was still violating court-ordered and constitutional requirements in the hiring and assignment of faculty and staff, and ordering additional injunctive relief.[58] In 1978, after two blacks had

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56/ Cooley v. Board of School Commissioners of Mobile County, No. 7100-72 (S.D. Ala.).

57/ J. S. 18b; A. 19a.

58/ Davis v. Board of School Commissioners, No. 3003-63-H (S.D. Ala., Oct. 27, 1977). Representative Gary Cooper testified at trial in 1976 that he had received complaints of employment discrimination by the board. A. 264a, 265a-66a.

been elected to the Mobile school board from single-member districts, the outgoing white commissioners voted to require a four-to-one majority to alter any existing board policy, a rule which would have guaranteed that no change of policy could occur without the support of a majority of the remaining white members. The district court struck down this new requirement on the ground that it was "conceived to", "devised to and will function to encumber the attempts of new black Board members to place on the agenda and secure sufficient votes ... for passage of proposals prompted by and in the interests of their constituents."[59]

Even if the school board had after 1970 remained in compliance with outstanding federal court decrees, that would not have substantially attenuated the relevance of its earlier conduct. A 1970 decree had imposed on each board member personally a fine of $1,000 a day if the court decrees were not obeyed;[60] further resistance

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59/ Appendix to this brief, App. 13a, 14a.

60/ J.S. 16b; A. 17a.

was hardly likely in face of that drastic but necessary measure. Of the five whites who were school commissioners when this case went to trial, two, Sessions and Berger, had been commissioners in 1970. Appellants do not in this Court assert, and did not at trial prove, that either the nonresponsiveness of the board or the dilutive effect of the at-large system had diminished since 1970. The conduct of the defendants in connection with the Kennedy and Sonnier bills indicated that the old attitude toward blacks continued unabated.

Appellants urge that, even if blacks cannot elect a black to the school board, they have an opportunity to affect which white will be elected. The district judge properly did not credit the evidence offered by the defendant on this issue. A single defense witness testified that the overall winners in 19 of 27 contests since 1960 had also received a majority of the votes of the predominantly black wards. A. 389a. A detailed analysis of election returns revealed, however, that the black wards had never been the swing vote in any election; in every case the successful white candidate had a majority of the white vote, and would have won even if the losing candidate

had carried the black wards. A. 288a-290a, 540a.

Finally, appellants urge that there is a "longstanding and continuous commitment to the people of Mobile and the State of Alabama" to using at-large elections for the Mobile school board. Brief for Appellants, pp. 51-54. But the most recent legislative expression of preference on this issue was the adoption in 1975 of the Kennedy Act, which abolished at-large elections and mandated the use of single-member districts. While this case was pending in the district court, moreover, the members of the school board repeatedly announced their support of single-member districts.[61] The record reflects not the slightest public opposition to these proposals. Whatever tactical purposes these professed policies may have served in 1976, appellants cannot now disavow them.

The record in this case reveals the type of evidence found sufficient to establish a constitu-

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61/ A. 101a, 111a, 115a, 145a-46a, 168a, 177a-173a, 178a.

tional violation in White: racial bloc voting by whites that consistently defeats black and black-supported candidates, racial discrimination by the at-large white officials against their black constituents, a long history of official discrimination, and the existence of laws which aggravate the racial effect of the at-large system. That system is the functional equivalent of one in which whites reside in a district which has five school commissioners while blacks reside in a district which has none. The district court's finding of dilution represents "a blend of history and an intensely local appraisal of the design and impact of the [Mobile] multi-member district in the light of past and present reality, political and otherwise", 412 U.S. at 769-70, and should be upheld.

IV. THE AT-LARGE SYSTEM FOR ELECTING THE MOBILE SCHOOL BOARD VIOLATES THE FIFTEENTH AMENDMENT

The complaint in this action alleged that the at-large system for electing the Mobile school board violated the Fifteenth Amendment as well as the Fourteenth. A. 75a. The district court noted the existence of this claim, J.S. 2b,

but did not discuss it. Appellees maintain that the Fifteenth Amendment provides an alternative ground for affirmance.

In our brief in City of Mobile v. Bolden, we set out at length our contention that the Fifteenth Amendment prohibits not only election practices which are intended to discriminate on the basis of race, but also those which "inherently operat[e] discriminatorily". Lane v. Wilson, 307 U.S 268, 274 (1939). We there explain that the paramount purpose behind that Amendment was to guarantee to blacks an effective franchise by which they could protect themselves against governmental discrimination. Brief for Appellees, No. 77-1844, pp. 82-91. Judge Wisdom so construed the Fifteenth Amendment in a companion case below. Nevett v. Sides, 571 F.2d 209, 231-36 (5th Cir. 1978).

Appellants urge that several decisions of this Court hold that proof of discriminatory purpose is essential to establish a violation of the Fifteenth Amendment. Brief for Appellants, pp. 32-35. But the decisions cited by

appellants do not support their contention. Wright v. Rockefeller, 376 U.S. 52 (1964), emphasized the absence of evidence of either discriminatory purpose or discriminatory effect, noting that the plaintiffs had "failed to prove that the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines." 376 U.S. at 46. Louisiana v. United States, 380 U.S. 145 (1965), struck down Louisiana's "interpretation test" under the Fifteenth Amendment not only because it was "part of a successful plan to deprive Louisiana Negroes of their right to vote", 380 U.S. at 152, but also because it was "completely devoid of standards and restraints". 380 U.S. at 153. Mr. Justice Stewart's opinion in United Jewish Organizations v. Carey, 430 U.S. 144, 179-80 (1970), does use the term "contrivance", but does not purport to be an exhaustive listing of the practices which violate the Fifteenth Amendment. The issue in UJO was whether the type of racial motivation involved was unconstitutional, and Justice Stewart's opinion purports to describe, not all the practices which the Amendment forbids, but only the types of motivation it prohibits. Each of these

cases indicates that discriminatory intent is sufficient to prove a violation of the Fifteenth Amendment, but none suggests it is necessary.

The election system in operation in Mobile utterly frustrates the purpose of the Fifteenth Amendment. In form blacks are able to mark and cast ballots, but in substance they are disenfranchised. They cannot elect any black to the school board. They cannot elect to the board any white known to support fair treatment for the black community. And they cannot protect themselves against policies of segregation and discrimination by the all-white board. Despite the Voting Rights Act, and although at least one out of four Mobile voters is black, Brown v. Board of Education could not be implemented by resort to the ballot, but required instead resort to the federal courts.

On repeated occasions this Court has insisted that a variety of grievances against state and local governments, many involving problems with a particular impact on racial minorities, should be resolved by elected public officials. The remitting of such issues to elected

officials requires, we suggest, consistent judicial vigilance to assure that the electoral system affords those minorities a realistically equal opportunity to advance their interests through the electoral process.

CONCLUSION

For the above reasons the judgment of the court of appeals should be affirmed.

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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION
CIVIL ACTION
No. 75-298-P

LEILA G. BROWN, et al.,

Plaintifffs,

- v -

JOHN L. MOORE, et al.,

Defendants.

ORDER ON SELECTION OF SCHOOL BOARD CHAIRMAN AND ON PLAINTIFFS' MOTION TO ENJOIN NEW BOARD POLICIES, ETC.

The plaintiffs filed a motion to show cause why the defendants should not be held in contempt. In their motion the plaintiffs sought the following relief: (1) show cause contempt citations against the defendants School Board (Board) and its member commissioners for failure to elect a President or Chairman pursuant to this court's 1976 Opinion and Order. Brown v. Moore, 428 F.Supp. 1123, 1145 (S.D. Ala. 1976), aff'd. 575 F.2d 298 (5th Cir. 1978); (2) an injunction

against implementation of newly adopted internal policies of the Board; and (3) designation by the court of either Commissioner Drago or Commissioner Alexander as Chairman or President of the Board.

After a hearing on the matter of contempt this court issued an order on October 20, 1978 (amended on October 25) in which Commissioners Bosarge, Sessions and Alexander were found in contempt. Furthermore, the Board and its members were ordered to meet the following day and elect a Chairman or Presisent in conformity with this Court's original decree in this order. The Board failed to do so and applied to Justice Lewis F. Powell, Jr., of the United States Supreme Court for relief.

On October 27, 1978, Mr. Justice Powell issued an order staying both the November elections of the two new Board members and the civil contempt order pending the Supreme Court's decision on noting probable jurisdiction of the case. On October 30, 1978, the Supreme Court did note probable jurisdiction. 47 U.S.L.W. 3301 (October 30, 1978). The next day, Mr. Justice Powel vacated his October 27 stay order with regard to the November elections, maintained the stay of the contempt order and added:

> "With respect to the selection of Chairman of the School Board, the district court may take such other action not inconsistent with this order as it deems appropriate."

Moore v. Brown, 47 U.S.L.W. 3314 (October 31, 1978).

On November 14, 1978, a hearing was held for the purpose of selecting a Chairman of the Board pursuant to the Supreme Court order and of taking additional evidence on the plaintiffs' motion for injunctive relief with regard to the new Board policies.

November 15, 1978 was the date set for the newly elected Board members to take office. All members of the Board as it would be constituted November 15, 1978, were invited to be present. All appeared with the exception of Board member Bosarge who was hospitalized.

After asking the plaintiffs' and defendants' attorneys if there were any recommendations as to the procedure the court should employ in selecting a chairman, the court stated that over the next two years defendant Dan C. Alexander, Jr. should serve for a one year period in the capacity of non-voting Charirman and that defendant Ruth Drago

should serve for one year in the same capacity. The initial Chairman's term was to commence November 15, 1978, and the other term was to begin on the one-year anniversary School Board meeting date.

After this decision was announced, advice was sought from each of the new Board members as to their preference between the two, Drago and Alexander, as to who should serve the first term beginning November 15, 1978. Board members Alexander, Gilliard, Berger, and Drago each expressed a preference for defendant Alexander. Board member Cox abstained. The court took the advice of the majority of the Board and appointed Alexander as non-voting chairman to take office November 15, 1978, who would then be succeeded by Drage as non-voting chairman on the one-year anniversary meeting date of the School Board.

The two designated chairman, Alexander for the November, 1978 to November, 1979 period, and Drago for the November, 1979 to November, 1980 period, will not have a vote except as set out in this Court's original decree:

> "For this two year period of time only, 1978 to 1980, the Chairman will have the right to vote only in the event of a tie vote which could be occasioned by abstention, absence, or any other reason."

Brown v. Moore, supra at 1145-46.[1/]

If either of these two chairman during their respective terms of office are not present, or refuse to serve, or cannot serve for any reason, as Chairman, the regularly elected vice-chiarman will serve and have all voting rights, etc. that such Board member ordinarily has. Alexander and Drago during their respective terms as Chairman will not have the right to vote because of their not serving as chairman during their respective chairmanships.

After resolution of the Chairman selection issue, the court took additional evidence and heard arguments on the issue of injunctive relief. The plainiffs had amended their motion invoking All Writs Act, 28 U.S.C. §1651, as a basis for enjoining enforcement of the new Board policies.

1/ A tie vote means exactly that. It would necessarily have to be a 2-2 or a 2-2-1 vote. If three constitutes a quorum, there could be a 1-1 (if an abstention) or a 1-1-1 vote. Either would be considered a tie vote. The non-voting Chairman cannot use his presence to constitute a voting quorum or to constitute a quorum for any other purpose. A quorum would have to be constituted from the regular voting members. A 2-1-1-1 vote is not a tie vote.

The following findings of fact and conclusions of law are addressed to the question of the propriety of the new polices.

FINDINGS OF FACT

In the original opinion and order, as amended, in this action, the remedial measures prescribed by the court included the 1978 election of two Board Commissioners from two predominantly black areas, Districts 3 and 4. In compliance with this directive, primary elections were held for the two seats in September of this year. Two black citizens, Mr. Norman G. Cox and Dr. R. W. Gilliard, won their respective primary races for the Board and were elected without opposition in the general election of November 7, 1978. Eight days later they were sworn in as members of the Board.

On October 11, 1978, more than a month before the new black Board members took office, the Board adopted a new set of internal policies at its regular meeting [see minutes of meeting (Plaintiffs' Exhibit No. 2 from October 20, 1978 hearing) and new policies (file item No. 216, Attach-

ment B)] which supplanted the policies adopted in August of 1974 (see file item No. 216, Attachment A). A comparison by the court of the two sets of policies revealed substantive changes enhancing the position of President or Chairman and the relative power of Board members.

The powers of the non-voting Chairman (President) have been expanded to enhance his or her control over Board matters in the following ways:

(1) An override of the President's decisions on points of order now requires a two-thirds majority of the Board (i.e., four votes) whereas a simple majority (i.e.g, three votes) would suffice under the August 1974 policies (compare new and old policy §BBABA);

(2) Emergency Board meetings now may be held only upon the request of the President (new Board policy §BBB);

(3) The President is now an ex-officio member of all committees (compare old and new policy §BBC);

(4) The President possesses the power, with the approval of the Board, to appoint chairpersons of all advisory committees whereas the recommenda-

tion of the Superintendent was part of the procedure before (compare old and new policy §BBFA and BBFB);

(5) The President must approve all items to be placed on the written agenda of regular Board meetings (compare old and new policy §BCBD).

It is significant, too, that the necessary number of votes of Board members has been raised from three to four creating in the words of Alexander a "super" majority, with regard to the following actions:

(1) To call special meetings of the Board (compare old and new policy §BCAC);

(2) To override prior actions of the Board (compare old and new policy §BCB);

(3) To constitute a quorum (compare old and new policy §BCBFA);

Board President Dan C. Alexander, Jr., declared at a press conference and claimed in open court that a number of the policy changes adopted in October were designed to give continuity and stability to prior Board policy by circumventing the creation of a new 3-person majority on the board consisting of the two new black Board members and a present member of the

Board. Alexander said that this new majority would work to overturn previous actions and prior policy of the "old" Board.

The Board meeting of October 25, 1978, demonstrated how the powers of the President or Chairman to prevent a majority of Board members from prevailing on issues of importance. The Board had been uncussessful in its attempts to elect a non-voting Chairman and at the October 25 meeting one Board member announced his intention to break the deadlock by changing his vote to create the necessary three-person majority for Drago. (See minutes in Plaintiffs' Exhibit No. 1, pp. 50-64, offered at hearing on November 14, 1978). Chairman Alexander employed his authority to pass on points of order in deciding unanimous approval by the Board was essential to place the vote for non-voting Chairman on the agenda since it was not part of the written agenda for the meeting. With two votes against supplmenting the agenda with this m æterW Alexander refused to permit such a vote.

These actions stand in sharp contrast to the procedures employed by Alexander subsequent to this court's finding of him as well as Board

members Bosarge and Sessions in contempt on October 20, 1978, for failure to vote pursuant to this court's decree in this cause. Alexander, as Board Chairman, had no difficulty with the procedure to poll the Board and to permit himself to change his previous abstention to a vote for Drago. Niether did he have difficulty in allowing Bosarge and Sessions to vote again. Furthermore, the following day he had little trouble in conducting another vote and permitting Sessions to change his vote from Bosarge to Drago, one of the candidates for the position designated by the court.

In connection with the show cause contempt citation and the failure of the Board to elect a Chairman as ordered by the court, Chairman Alexander stated in substance that he was going to fight this court's order as long as he could. The various maneuvers, the encouragement to Bosarge with reference to Bosarge's failure to vote for either of the two designated persons, the attitude, the testimony, and the inconsistent positions of the defendants in the different Federal courts relating to the unexpired terms of the already elected Board members all serve

to substantiate the effort and purpose of the defendants to frustrate this court's order.

The defendants' position in this court was for the terms of all those then serving on the Board to be completed without restriction. The latest expiration date of any term member then serving on the Board will be November, 1982.

The reply brief of the defendants-appellants to the Fifth Circuit Court of Appeals, Case No. 77-1583, states:

> "It appears that Plainitffs' counsel expresses little concern over preserving the incumbencies of the individual defendants. Shortening the term of one commissioner, much less the terms of four commissioners, is 'fundamentally unfair', 'invidiously discriminatory' and 'violative of due process of law'. Such action is unconscionable and should not be considered in this case." (Emphasis added.)

Yet, in the defendants' application to the Supreme Court for stay of elections and stay of civil contempt sanctions, pending appeal to the Supreme Court of the United States, No. 78-357, at pp. 5 and 6, the defendants took an opposite position:

> "Indeed, a less intrusive, and far more practical remedy would have been simply to order in 1978 full elections of all 5 Commissioners by single-member district, thus giving all the County's voters, and not just its black voters, officials with the allegiance to a particular district's interest which the District Court apparently felt was essential to constitutionally sufficient representation. This would have avoided the enlargement of the Board from 5 to 6 members from 1978-1980, and the problems attendant to creating an amalgam Board of single-member and at-large Commissioners during this period." (Emphasis added.)

These inconsistent positions of the defendants in the Federal court system in this case, and the position of certain Board members in attempting to frustrate the single-member district plan ordered which included in its implementation a non-voting chairman, (so that none of the then elected Board members' term would be shortened) reflects a pattern of conduct of these defendants condemned by this court concerning the defendants' different positions on legislative proposals to provide for single-member district of the Board. (See, p. 21 of this court's original order beginning "On September 2, 1976, . . ." and ending on page 23 at "II".) In short, it is obvious that the basic thrust of these actions by the defendant Board, and certain of its members,

have been to delay or defeat their alleged support of the legislative actions and this court's orders of the single-member district election plans for the Board designed to remove the unconstitutional dilution of the black votes.

The core and thrust of this court's rulings in this litigation has been to remedy the unconstitutional dilution of the black vote in Mobile County in the election of Board members and the resulting Board policies that flow from this impermissible dilution. It is the finding of this court that the policy changes adopted by the Board in October of this year were devised to and will function to encumber the attempts of new black Board members to place on the agenda and secure sufficient votes, according to voting procedures at the time of this court's original order, for passage of proposals promoted by and in the interest of their constituents. This revisionary action by the Board represents a continuation of the unconstitutional voter dilution this court sought to remedy in its decree that is now almost two years old. Additionally, the court finds the enchanced powers of the non-voting President or Chairman will work to stave off Board members'

efforts to obtain adoption of programs and policies to which the President has objections.

In sum, it is the finding of this court that the Board's policy changes of late were conceived to and operate to impede, interfere and obstruct the injunctive remedy of this court's 1976 opinion and order whose purpose was to guarantee black citizens of Mobile County, through the ballot box, imput into the decision-making process of the School Board.

CONCLUSIONS OF LAW

The All Writs Act provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. §1651(a). Last year the Supreme Court construed its statutory provision and declared: "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained. . . ." United States v. New York Telephone Co., 434 U.S. 159,

____, 98 S. Ct. 1364, 54 L.Ed.2d 376, 389 (1977). Courts within the Fifth Circuit have stated similar positions on the operation of this judgment enforcement tool of the federal judiciary. Teas v. Twentieth Century Fox Film Corp., 413 F.2d 1263, 1267 (5th Cir. 1969), citing with approval United States v. Wallace, 218 F.Supp. 290, 292 (N.D. Ala. 1963); see also ITT Community Development Corp. v. Barton, 569 F.2d 1351, 1358-60 (5th Cir. 1978).

The All Writs Act is applicable in the factual context of the case sub judice in that "[s]ection 1651 gives the district court power to enjoin action that improperly hinders or defeats the jurisdiction which it is validly exercising." 9 Moore Federal Practice ¶110.29, pp. 316-17. There can be no doubt that the conduct of the School Board as detailed above meets this criterion for the utilization of the All Writs Act in the form of injunctive relief.

It has been suggested that the Board as re-constituted might seek to dismiss the pending appeal in this cause now in the Supreme Court. This court is of the opinion that it would be inequitable and unfair to permit a Board restructured by an order of this court to dismiss the

appeal and deny those ruled against the opportunity of testing the legality of that order.[2/]

It is therefore ORDERED, ADJUDGED and DECREED that the defendant Board of School Commissioners of Mobile County and the defendant School Commissioners are now constituted (Mr. Dan C. Alexander, Jr., Dr. Norman J. Berger, Mr. Hiram C. Bosarge, Mr. Norman G. Cox, Mrs. Ruth F. Drago, and Dr. R.W. Gilliard), individually and in their official capacity, their officres, agents, successors and those acting in concert with them, are thereby ENJOINED:

From implementing, enforcing or relying upon any new School Board policies which operates to;

(1) enhance the powers of the Board Chairman or President beyond those invested in said

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2/ The "real" and "basic" issues in this case, dilution of the black vote and remedy ordered, single-member districts, and the implementation of that order are already before the Supreme Court. The court herein enjoins this newly constituted Board from dismissing that appeal. On the other hand, the newly constituted Board must be permitted in all other respects to exercise all its perogatives, including appeal or not of this order, until such time as the Supreme Court of the United States rules otherwise in the case before it.

officer on January 18, 1977, and especially the following new School Board policies, to wit;

(a) A two-thirds majority (i.e., four votes) will be required to override the President's decisions on all points of order;

(b) Emergency Board meetings may be convened only on the approval of the President;

(c) For the first time, the Policies designate the President an ex-officio member of all Board standing committee;

(d) The President, with the approval of the Board, is empowered to appoint the Chairman of all advisory committees, whereas previously the recommendation of the Superintendent was also required;

(e) The President, for the first time, must approve all items to be placed on the written agenda or regular Board meetings, and

(2) raise the number of Board members' votes required as of January 18, 1977, to constitute a quorum or authorize any steps taken or procedure adopted by the Baord, and especially the following new School Board policies, to wit,

(a) To call special meetings of the Board;

(b) To override any prior actions of the Board; and

(c) To constitute a quorum of the Board.

It is further ORDERED, ADJUDGED and DECREED that pursuant to Mr. Justice Powell's order of October 31, 1978, it is ORDERED that defendant Dan C. Alexander, Jr. shall serve as non-voting Chiarman of the Board for one year, and that Ruth Drago shall serve in the same capacity for one year. Dan C. Alexander, Jr. is to serve as non-voting Chiarman commencing November 15, 1978, and defendant Ruth Drago shall serve as non-voting Chairman commencing on the one-year anniversary meeting date of the Board.

It is furthered ORDERED, ADJUDGED and DECREED that this court, upon its own motion, enjoins the present members of the Board, as set out above, and their successors in office individually and collectively, and all persons acting in concert with them from dismissing the appeal and petitions previously filed in this action in the Supreme Court of the United States. The present Board is free by majority vote to choose whether to appeal

or not to appeal, directly, by ancillary action, or otherwise, this or any other ruling by this court hereafter in this matter.

All costs are taxed to the defendants.

Done this the 24th day of November, 1978.

Virgil Pittman /s/
UNITED STATES DISTRICT JUDGE

U. S. DISTRICT COURT
SOU. DIST. ALA.
FILED AND ENTERED THIS THE
_____ DAY OF NOVEMBER 1978
MINUTE ENTRY NO. _____
WILLIAM J. O'CONNOR, CLERK
BY-

Deputy Clerk

FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 7 1979
MICHAEL RODAK, JR., CLERK

No. 78-357

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT R. WILLIAMS, et al.,

Appellants,

v.

LEILA G. BROWN, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR APPELLANTS

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March 1979

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REPLY BRIEF FOR APPELLANTS

This case was tried below on the appellees' theory that the Fourteenth and Fifteenth Amendments do not require a finding of purposeful discrimination before the use of multi-member electoral districts may be held unconstitutional. The district court accepted the appellees' constitutional theories, holding that *Washington* v. *Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), are inapplicable to so-called "voter dilution" cases.

On that basis, the court held that Mobile County's 140-year commitment to at-large election of its school commissioners was unconstitutional, not because of the state's *purpose* in establishing or maintaining the system but because of its *effects* on black voting strength, applying as the governing precedent the Fifth Circuit's decision in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd per curiam on other grounds sub nom. East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976).

In a summary decision the court of appeals affirmed with just one citation—its earlier decision invalidating the at-large election of the Commissioners of the City of Mobile, *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir. 1978), *prob. juris. noted*, No. 77-1844 (Oct. 2, 1978). In *Bolden* and its three companion cases the court of appeals held that the *Washington* v. *Davis* requirement of purposeful discrimination applies to voting dilution cases but that this requirement is necessarily satisfied by an affirmative determination under the criteria the court had laid out in *Zimmer*.

As we demonstrated in our opening brief, the errors of the courts below are manifest. The *Zimmer* criteria, whose purported satisfaction was without question the basis of the district court's judgment and the court of appeals' affirmance, are inconsistent with the decisions of this Court holding that state action violates the Fourteenth or Fifteenth Amendment only if it is purposefully discriminatory. Even if the *Zimmer* criteria were assumed to be proper guides to decision, the district court's findings on these criteria are fatally flawed; the findings were premised almost exclusively upon the existence of racially polarized voting, which is properly only the beginning point of the analysis and not the "something more" that the court of appeals indicated in *Bolden* that each *Zimmer* factor is supposed to provide, and the

findings improperly gave no weight to Alabama's long-term, 140-year commitment to the at-large election of Mobile County school board members. If proper constitutional principles are applied, as reflected in this Court's decisions in *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), and *White* v. *Regester*, 412 U.S. 755 (1973), there is no basis for a finding that the at-large election of the Mobile County school commissioners offends the Constitution. The appellees did not show either that Alabama's decision that the commissioners should be elected at large resulted from a racially motivated effort by the state to submerge black voting or that black voters had been deliberately excluded by the state from the political process, which exclusion could be remedied by the replacement of at-large voting with single-member districts.

Perhaps recognizing the infirmities of the decision below, the appellees now almost wholly ignore the *Zimmer* analysis, upon which their success below was based, and attempt to recast the case before this Court. The appellees now argue alternatively that the case should be decided on statutory grounds under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, a ground not considered by either court below, or that the district court in fact found purposeful discrimination against blacks in the state's *maintenance* of at-large elections. Appellees also argue, equally unsuccessfully, that *Washington* v. *Davis* is inapplicable to voting dilution cases. Finally, they argue that the decision below can be sustained by the Fifteenth Amendment, which allegedly prohibits at-large election systems having a discriminatory *effect*, without regard to any discriminatory state purpose.

In an amicus brief, the United States acknowledges that only purposeful state discrimination may be found to violate the Fourteenth Amendment but argues, with the appellees, that this requirement is satisfied by a district

court finding of purposeful discrimination in the *maintenance* of the at-large electoral system. Alternatively, the United States argues that the decision may be sustained under the Fifteenth Amendment, which it is claimed prohibits at-large electoral systems if, among other formulations, such electoral systems "are official action that enhances the effects of private racial bias in voting and that unfairly cancels out black voting strenth." (U.S. Amicus Br. 85.) The United States disparages, by mentioning without endorsement, the appellees' contention that the case should be decided in their favor on the basis of Section 2 of the Voting Rights Act.

The range and variety of the arguments offered by the appellees and the Government should not confuse the issues actually presented. In the sections that follow, we show (1) that the appellees litigated this case on constitutional theories different from those they now advance and, after prevailing on those infirm theories, cannot recast the case in this Court; (2) that, notwithstanding the arguments advanced by the appellees and the Government, both the Fourteenth and the Fifteenth Amendments require a finding of purposeful state discrimination to support a judgment that the at-large election of Mobile County school commissioners is unconstitutional; (3) that the opinion of the district court cannot reasonably be construed as making or supporting the necessary finding of purposeful state discrimination; and (4) that the appellees' belated claim based on Section 2 of the Voting Rights Act is groundless.

ARGUMENT

I. THE APPELLEES LITIGATED AND PREVAILED ON THE GROUND THAT THEY HAD SATISFIED THE REQUIREMENTS ARTICULATED IN *ZIMMER*, UNDER WHICH A DISCRIMINATORY PURPOSE IS CONSIDERED EITHER UNNECESSARY OR CONCLUSIVELY PRESUMED IF THE *ZIMMER* CRITERIA ARE SATISFIED.

Perhaps the most striking aspect of the appellees' brief is its failure to acknowledge the significance of *Zimmer* to their success below. In marked contrast to their brief in the court of appeals, the appellees' brief in this Court mentions *Zimmer* only once, and there only in response to our characterization of the basis of the decision of the court of appeals below. (Appellees' Br. 33-34.)

Although for obvious reasons the appellees and the United States would rather ignore *Zimmer*,[1] there is no doubt that the appellees litigated and prevailed below on the theory that the *Zimmer* criteria governed a determination of the constitutionality of the at-large election of Mobile County school commissioners, and that *Zimmer* and other voting dilution cases did *not* require an independent showing of purposeful state discrimination. As we noted in our main brief, the emphasis on the effect and not the purpose of the at-large election of school commissioners was evident in the appellees' complaint, their amended complaint and their contribution to the joint pretrial statement. (Appellants' Br. 6.) The appellees' response to this elementary point is weak and unpersuasive.[2]

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[1] In East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (*per curiam*), this Court, reviewing *Zimmer*, sharply criticized the court of appeals' opinion.

[2] The appellees assert that their "complaint is phrased with sufficient breadth to encompass either claim" (Appellees' Br. 32), *i.e.*, a claim of unconstitutionality based on discriminatory purpose or a claim based on mere effects, but they supply no

(footnote continued)

Nor is there any doubt that the district court's decision was premised on the analysis prescribed in *Zimmer*, which the court viewed as *not* requiring a showing of a discriminatory state purpose. Thus, the district court stated that "*Washington* did not overrule [this Court's voting dilution precedents] nor did it establish a new Supreme Court *purpose* test. . . ." (J.A. 34a.) (Emphasis in original.) Rather, the court applied what it understood to be "[t]he controlling law of this Circuit . . . enunciated by Judge Gewin in *Zimmer*" (J.A. 36a), which, as we showed in our opening brief, was predicated solely on the effects of an at-large voting system, not its purpose (Appellants' Br. 25-26). On the basis of *Zimmer*, the trial court concluded:

> "The evidence when considered under these teachings convinces this court that the at-large districts 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' *Whitcomb*, 403 U.S. at 143, and *Fortson*, 379 U.S. at 439, and 'operates impermissibly to dilute the voting strength of an identifiable element of the voting population.'

(footnote continued)
record reference to the language of the complaint that allegedly presented such an issue of intent. They also assert that their "Pretrial Proposed Findings of Fact and Conclusions of Law" presented the intent issue. In this document the appellees argued *Zimmer* and discriminatory effects at length and, in a few additional pages, did what they could to avoid the impact on their case of *Washington v. Davis*, which had come down three months before the document was filed. Presumably the appellees would not press their reliance on this pleading too far, for in it they told the district court what they now deny—that *Washington v. Davis* "very clearly requires this Court to find discriminatory intent as one of the elements of any successful Fourteenth or Fifteenth Amendment claims. . . ." (P. 28.) Utilizing the *Zimmer* mode of analysis that the appellees advanced throughout the case but not following them in this single afterthought argument, the district court drew no such conclusion from *Washington v. Davis* and made no such finding.

> *Dallas*, at 480. The plaintiffs have met the burden cast in *White* and *Whitcomb* by showing an aggregate of the factors catalogued in *Zimmer*." (J.A. 41a.)

The appellees also relied heavily on *Zimmer* in their brief to the court of appeals, arguing that the court could even summarily affirm the district court judgment since "[t]he district court's lengthy findings carefully follow the directions this Court has given for consideration of claims that multi-member districts unconstitutionally dilute minority voting strength." (Appellees' Court of Appeals Br. ix.)[3] The court of appeals did summarily affirm, declaring that "Judge Pittman has applied the proper standards for evaluating plaintiffs' contention that the election of school commissioners on an at-large basis dilutes the votes of black citizens," and citing only its decision in *Bolden* v. *City of Mobile*, 571 F.2d 238 (5th Cir. 1978). (J.A. 2a.)

[3] A reading of the appellees' brief to the court of appeals leaves no doubt of their fundamental reliance on *Zimmer* in that court. The first "issue presented" listed in the appellees' court of appeals brief was "[w]hether the thorough findings of fact by the district court, carefully and explicitly considering each of the primary and enhancing factors prescribed in *Zimmer* v. *McKeithen*, . . . are clearly erroneous under Rule 52(a), F.R.C.P." (Appellees' Court of Appeals Br. 3.) In introducing the district court's findings, the appellees represented that the "court weighed the evidence by careful application of the standards in *Zimmer* v. *McKeithen*" (*id.* at 9), and in their Summary of Argument the appellees justified their assertion that the case did "not present any novel questions" with the claim that the district judge had "reached his decision by diligently following, step by step, the instructions this court has given in *Zimmer* v. *McKeithen*, *supra*, for analyzing multimember districts in light of past and present political realities" (*id.* at 27). The *Zimmer* decision itself was cited 17 separate times in the 42-page Argument section of the appellees' brief.

In our opening brief, we explained that the court of appeals' decision can best be understood by reference to its earlier decisions in *Bolden* and a companion, *Nevett* v. *Sides*, 571 F.2d 209 (5th Cir. 1978). (Appellants' Br. 36-42.) The lack of congruence between what actually happened below and the appellees' current version of what happened below is well illustrated by their discussion of this seemingly noncontroversial point. In *Nevett* v. *Sides* and three companion cases, including *Bolden*, the court of appeals carefully and deliberately undertook a re-examination of *Zimmer* in the light of *Washington* v. *Davis* and *Arlington Heights*. It concluded that purposefulness is an element of either a Fourteenth Amendment or a Fifteenth Amendment violation in a voting dilution case but that the court had acted so presciently in devising the *Zimmer* criteria that their satisfaction adds up to the required purposefulness. That is how any reader of the four opinions, *Nevett* v. *Sides*, *Bolden* and the two others, would understand them. Yet the appellees blandly talk as if *Nevett* v. *Sides* and *Bolden* were only distantly related if at all and as if nothing very much had been decided in either case in any event. (Appellees' Br. 33-34.) What they say cannot be taken seriously, even as advocacy.

As for the appellees' suggestion that the citation of *Bolden* did not mean that the different panel of the court of appeals in this case adopted the equation of the *Zimmer* criteria with the requisite finding of intent, that may be so. It seems unlikely, but it may be so. But we meant by our explanation of the citation to be generous to the court and to the appellees' case. If the court of appeals in this case did not mean to endorse the *Zimmer*-equals-intent holding of *Bolden*, it must have been affirming the district court on its own terms, and that entails an error more elementary than the one we ascribed to it: a failure even to recognize that purpose is required in voting dilution

cases and a reliance on the *Zimmer* criteria for what they originally were—indicia of whether the *effects* of at-large voting have been unconstitutionally discriminatory.

The short of it is that the appellees embraced the *Zimmer* criteria in the tribunals where those criteria are cherished and now attempt to disown them in this tribunal where, quite understandably, the appellees fear that *Zimmer* is in disrepute. The appellees' desire to prevail on whatever grounds are thought likely to appeal to the court then hearing their case, regardless of what has gone before, does not justify their rewriting of history.

II. BOTH THE FOURTEENTH AND FIFTEENTH AMENDMENTS REQUIRE A FINDING OF PURPOSEFUL STATE DISCRIMINATION.

We demonstrated in our opening brief that both the Fourteenth Amendment and the Fifteenth Amendment require a finding of purposeful discrimination by the state as a predicate for a finding of a constitutional violation. (Appellants' Br. 28-35.) The United States agrees, at least with respect to the Fourteenth Amendment, stating in its *amicus* brief:

> "In *Washington* v. *Davis*, *supra*, this Court held that official action will not be held unconstitutional solely because it has a racially disproportionate effect. To establish a violation of the Equal Protection Clause, the Court held, proof of a discriminatory purpose must be shown. We agree with the view expressed by the Fifth Circuit in *Nevett* v. *Sides*. . . that this proposition applies to all Fourteenth Amendment racial discrimination claims, including those involving vote dilution." (U.S. Amicus Br. 51-52.)

The position of the United States with respect to the Fifteenth Amendment is less easily understood. At one point in its brief it says:

> "We submit . . . that the judgments in these cases also may properly be affirmed by this Court under the Fifteenth Amendment, without reaching the Equal Protection Clause claims, so long as the Court accepts the findings of the courts below that the electoral schemes here are official action that enhances the effects of private racial bias in voting and that unfairly cancels out black voting strength." (U.S. Amicus Br. 85).[4]

To the extent that the United States' position is that discriminatory intent by the state is not necessary to a Fifteenth Amendment violation, we disagree.

The appellees contend that a showing of purposeful state discrimination is unnecessary for either Fourteenth or Fifteenth Amendment purposes. (Appellees' Br. 36, 55.) As we show below, this position is plainly without merit.

A. The Fourteenth Amendment

The appellees' brief in this case refers to their brief in *Bolden* for development of their argument that "proof of discriminatory motive is not necessary under *White* and *Whitcomb*." (Appellees' Br. 36) That argument is largely premised on the view that this Court's decisions in *White* v. *Regester*, 412 U.S. 755 (1973), and *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971), do not require a finding of purposeful

[4] As explained below, this quotation is only one of a number of articulations of the Government's position. See pp. 15-16, *infra*.

discrimination. (Appellees' Br., No. 77-1844, pp. 53-61.)[5] But, as we showed in our opening brief, there is no inconsistency between this Court's recognition of the intent requirement in *Washington* v. *Davis* and its decisions in *White* and *Whitcomb*. (Appellants' Br. 56-60.) These latter cases permit invalidation of an at-large electoral system *only* if the system results from purposeful discrimination by the state or a remedy is needed for the deliberate exclusion of racial minorities from the electoral process.

Neither condition is satisfied here. We demonstrated in our opening brief that there is no basis on which the district court could have found that the century-and-a-half commitment by Alabama to the at-large election of Mobile school board members was the product of racial

[5] The appellees also argue that one can infer that discriminatory intent is not required in the "voter dilution" cases from the alleged facts (1) that the *Reynolds* v. *Sims* apportionment cases do "not rest on any malicious intent to disenfranchise" certain voters and (2) that the apportionment cases and the "voter dilution" cases are part of the same "branch" of equal protection law. (Appellees' Br., No. 77-1844, pp. 58-61.) The Government also tries to assimilate the voting dilution cases to the reapportionment cases. (U.S. Amicus Br. 40-42, 71.) The only relationship between the two types of cases is the coincidence that each involves electoral districting. At-large elections, which most commonly give rise to claims of voting dilution, cannot, taken by themselves, fail to satisfy the one-person, one-vote criterion of *Reynolds* v. *Sims:* all persons within an at-large district cast votes of equal weight. Moreover, the reapportionment cases do not entail any inquiry into the purpose, malicious or benign, of the legislature for the reason that the state discrimination is apparent from the enactment itself, a reason that does not apply to an at-large electoral system.

animus (Appellants' Br. 60-61),[6] and we shall show below that the appellees' claim of a district court "finding" that Mobile County's at-large electoral system for its school commissioners is maintained by the state for discriminatory purposes is erroneous (see pp. 17-20, *infra*). As developed in our initial brief, neither is there evidence that Mobile County blacks have been excluded from the process of electing school board members by means such as the white slating mechanism found to exist in *White* v. *Regester*. (Appellants' Br. 62-63.)

The appellees and the United States urge that the existence of "bloc voting" may itself be viewed as equivalent to a formal barrier to effective political participation by black voters in Mobile County and thus invoke the rationale applied by this Court in *White* v. *Regester*. Thus, the appellees claim that "white bloc voting is the keystone of a dilution case under *White* and *Whitcomb*." (Appellees' Br. 37.) The United States argues that the "immediate instrumentality by which whites assure that blacks will be denied representation is racially polarized bloc voting in Mobile" and that the election process in Mobile County "is the exact analogue of the exclusionary slating process" considered in *White* v. *Regester*. (U.S. Amicus Br. 62-63.)

[6] As in so many other municipal governments, at-large election of Mobile County school commissioners has long been the preferred method of election—in this case for over 140 years—reflecting not racial bias or prejudice but a commitment to a less partisan and parochial selection of public officials. As we discussed at greater length in our opening brief, municipal governments often use such at-large electoral systems to promote city-wide attitudes on the part of the public officials. (Appellants' Br. 64-69.) The needs of local governments require flexibility and justify the application of standards different from those that might be applied in assessing the appropriateness of at-large elections for state legislators.

As we explained in our opening brief, the law is clear that such racially polarized voting does not make out a constitutional violation. These arguments amount to a claim either that minority voters or candidates have constitutional protection from the "unfortunate practice" of "voting for or against a candidate because of his race," a claim expressly rejected in the prevailing opinion in *United Jewish Organizations* v. *Carey*, 430 U.S. 144, 166-67 (1977),[7] or that racial minorities are entitled to proportional representation, a claim rejected in *Beer* v. *United States*, 425 U.S. 130, 136 n.8 (1976). (Appellants' Br. 42-43.)

The district court expressly found that "[t]here are no formal prohibitions against blacks seeking office in Mobile County," that "blacks register and vote without hindrance," that "black[s] and whites participate in both parties," (J.A. 12a), and that "[a]ny person interested in running for school commissioner is able to do so" (J.A. 36a). These findings are in marked contrast to those made in *White* v. *Regester*.[8]

[7] In our opening brief (*e.g.*, p. 43) we mistakenly referred to this language from Mr. Justice White's opinion in *United Jewish Organizations v. Carey* as an expression of the Court. The appellees quite correctly emphasize that this portion of the opinion announcing the judgment of the Court was joined by only two other Justices.

[8] For example, the district court in *White* relied for its finding that blacks in Dallas County had been "effectively excluded from participation in the Democratic primary selection process" on the existence of a white-dominated slating organization that "without the assistance of black community leaders, decides how many Negroes, if any, it will slate in the Democratic primary." Graves v. Barnes, 343 F. Supp. 704, 726 (W.D. Tex. 1972) (three-judge court). By contrast, as explained in our initial brief, the record in the instant case indicates that there is no effective white-oriented slating organization at all, and that the only effective political organization in Mobile County primaries is the Non-Partisan Voters League, a local black endorsing organization. (Appellants' Br. 47.) Nor was there any evidence in the instant record of any other barriers, formal or informal, to blacks becoming candidates for the Mobile County school board. (*Id.* at 46-49).

Apparent appeals to racial prejudice made in some Mobile County political campaigns that appear in the record have been skillfully marshalled by the appellees in their brief. (Appellees' Br. 39-41.) The division of the County into "safe-white" and "safe-black" districts will presumably diminish such appeals (though it will not affect at all the attitude that they manifest). As the appellees and the Government note (Appellees' Br. 32; U.S. Amicus Br. 47), a state acts unconstitutionally if it purposefully discriminates against a minority by deliberately choosing to have an electoral system in which such appeals will surely succeed in submerging the minority vote. But, under this Court's precedents, a state that has not acted with the deliberate design to discriminate against the minority voter or minority candidate has no federal constitutional obligation to create an electoral situation in which such appeals will not have that effect. The arguments of the appellees and the Government concerning the significance of bloc voting in Mobile County are refuted by those precedents.

B. The Fifteenth Amendment

The appellees' argument, primarily developed in the *City of Mobile* case, that the Fifteenth Amendment "does not require a showing of racial motive or purpose" (Appellees' Br., No. 77-1844, p. 83) can be dealt with briefly. The appellees' references to the Congressional debates preceding ratification of the Fifteenth Amendment (*id.* at 87-90) are entirely consistent with the view that where, as here, a state legislative enactment is neutral on its face, the *state* may be said to have "denied or abridged" the right to vote "on account of race, color, or previous condition of servitude" only if the neutral state enactment was the product of purposeful state discrimination or is administered with a discriminatory design. This view is also entirely consistent with the case principally relied upon by the appellees—*Lane* v. *Wilson*, 307 U.S. 268

(1939)—as we have already demonstrated in our principal brief. (Appellants' Br. 34-35.) The claim that the court in *Lane* did not perceive or attach significance to the obvious racial discrimination inherent in the state's successor to the invalidated "grandfather clause" is untenable.

The United States suggests a novel, and puzzling, interpretation of the Fifteenth Amendment. While acknowledging that "[n]early all of this Court's cases decided under the Fifteenth Amendment have involved challenges to laws enacted or administered with a clear discriminatory intent" (U.S. Amicus Br. 90), the United States nevertheless suggests that such discriminatory state intent may not be required in certain circumstances. Just what those circumstances may be is not at all clear from its brief. In one formulation of its proposed standard, the Government suggests that a discriminatory state purpose is not essential to a Fifteenth Amendment claim if the court finds "official action that enhances the effects of private racial bias in voting and that unfairly cancels out black voting strength." (*Id.* at 85.) At other points the Government's brief suggests that an electoral system may be found to be in violation of the Fifteenth Amendment if it "facilitates" (*id.* at 87), "maximizes (*id.* at 89, n. 54), "promotes" (*id.* at 95, citing *Anderson* v. *Martin*, 375 U.S. 399, 404) or "magnifies" (*id.* at 95-96, n.58) private discrimination. These words apparently are used interchangeably, although their commonly understood meanings are quite different. Nor is this the only aspect of the Government's formulation that is inexplicably varied. Thus, the proposed requirement that the electoral system "unfairly cancels out black voting strength" (*id.* at 85) is later modified, without explanation, to require that the result be "elections in which blacks have no effective opportunities to elect candidates of their choice" (*id.* at 88).

The variety of formulations offered by the Government to describe its theory of the standard of decision under the Fifteenth Amendment reflects both the novelty of the theory urged and the extreme difficulty in applying the proposed standard(s) in subsequent cases. Apart from this, any claim that a discriminatory purpose by the state is not necessary to make out a violation of the Fifteenth Amendment is at odds with the plain language of the Amendment and with this Court's decision in *Terry* v. *Adams*, 345 U.S. 461 (1953), the decision on which the Government principally relies.

The Fifteenth Amendment provides that the rights of citizens to vote "shall not be denied or abridged *by the United States or by any state* on account of race, color, or previous condition of servitude." (Emphasis added.) The reasons underlying the requirement of purposeful discrimination as a basis for a finding of a Fourteenth Amendment violation by the state apply with full force to findings under the Fifteenth Amendment. To the extent that the state action is neutral on its face—as is an at-large election law—it cannot be said that the *state* has denied or abridged any voting rights "on account of" race unless there is evidence of discriminatory intent. (See Appellants' Br. 30.)

Terry v. *Adams* is entirely consistent with this principle. That case involved the white-only "Jaybird Association," which had been in existence since 1889 as an undisguised effort to exclude blacks from the political process in Texas. The Court held that the operation of this Association along with the Democratic Party involved the state to such an extent as to justify the conclusion that there was the requisite state action. As Mr. Justice Frankfurter—who characterized the case as "by no means free of difficulty," 345 U.S. at 472—stated in his separate opinion, "[i]f the Jaybird Association . . . is a device to defeat the law of Texas regulating primaries, and if the

electoral officials, clothed with State power in the county, share in that subversion, they cannot divest themselves of the State authority and help as participants in the scheme." *Id.* at 475-76. Justice Frankfurter immediately followed this statement with an observation confirming his view of the purposeful state discrimination inherent in the Texas Jaybird system: "Unlawful administration of a State statute fair on its face may be shown 'by extrinsic evidence showing a *discriminatory design* to favor one individual or class over another not to be inferred from the action itself,' " citing *Snowden* v. *Hughes*, 321 U.S. 1, 8 (1944). *Id.* (emphasis added).

In short, the hidden meaning of *Terry* urged by the United States is not there. The state's participation in the scheme in *Terry* was knowing and purposeful. As in other Fifteenth Amendment cases, in *Terry* the discriminatory purpose was "painfully apparent." (U.S. Amicus Br. 74, citing *Nevett* v. *Sides*, *supra*, 571 F.2d at 220).

III. THE DISTRICT COURT'S OPINION CANNOT REASONABLY BE READ AS FINDING THAT THE STATE MAINTAINED THE AT-LARGE ELECTION OF MOBILE COUNTY SCHOOL COMMISSIONERS FOR A DISCRIMINATORY PURPOSE.

Neither the appellees nor the United States argues that the state law governing the election of members of the Mobile County school board was adopted with a discriminatory purpose. However, in an obvious effort to recast the litigation to make it more nearly consistent with *Washington* v. *Davis*, both the appellees and the United States argue that the case was decided below, at least in part, on the ground of a "present purpose" to "maintain" a discriminatory system. The appellees go so far as to assert:

> "[T]he district court found . . . that Mobile's [at-large election] system is being maintained be-

> cause of a 'present purpose' to discriminate against black voters and to prevent the election of black members of the board. The record fully supports the findings below." (Appellees' Br. 17-18)

They even urge that the case is one of concurrent findings of fact by two courts that this Court under its traditional policy should not review. (*Id.* at 15-16.)

There are no such findings as the appellees urge. There is not even, on any fair reading of the district court's opinion, any such conclusion. In the passage to which the appellees refer the district court did no more than refer to a possible alternative ground of decision on which it chose not to rest.[9]

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[9] The appellees rely on portions of two sentences of the district court's opinion, which sentences occur near the end of the court's nine-page explanation of why it believed that *Washington* v. *Davis* does not require a showing of purposeful discrimination in voting dilution cases. These two sentences and the district court's concluding paragraph that immediately ensues are as follows:

> "It is not a long step from the *systematic exclusion of blacks* from juries which is itself such an 'unequal application of the law ... as to show intentional discrimination' ... and the deliberate systematic denials to people from juries because of their race ... to a present purpose to dilute the black vote as evidenced in this case. There is a 'current' condition of dilution of the black vote resulting from intentional state legislative *inaction* which is as effective as the intentional state action referred to in *Keyes*. *Washington*, at 2048.
>
> "More basic and fundamental than any of the above approaches is the factual context of *Washington* and this case. Initial discriminatory purpose in employment and in redistricting is entirely different from resulting voter dilution because of racial discrimination. Washington's failure to expressly over-

(footnote continued)

—The sentences occur *not* in the district court's "Findings of Fact" section, but in an introductory portion of the "Conclusions of Law" section.

—The court's remarks even in this "Conclusions of Law" section were not in response to any request by plaintiffs for a "finding" that the at-large election of possible school commissioners was unconstitutional because of any "present purpose" to maintain the system to discriminate against blacks.

—The court's statement is not supported by any discussion of facts that were intended to or would support a finding of such discriminatory action by the state.

—The statement occurs in the penultimate paragraph of the district court's *nine-page* effort to distinguish this Court's decision in *Washington* v. *Davis*, 426 U.S. 229 (1976), an effort that would have been unnecessary if the court was prepared to find that the at-large election system was the product of a discriminatory purpose by the state.

—In fact, the statement is immediately followed by the district court's rejection of "any of the above approaches" in favor of a conclusion that this Court's decision in *Washington* "did [not] establish a new Supreme Court *purpose* test...." (J.A. 34a.) (Emphasis in original.)

(footnote continued)

> rule or comment on *White*, *Dallas*, *Chapman*, *Zimmer*, *Turner*, *Fortson*, *Reynolds*, or *Whitcomb*, leads this court to the conclusion that *Washington* did not overrule those cases nor did it establish a new Supreme Court *purpose* test and require initial discriminatory purpose where voter dilution occurs because of racial discrimination." (J.A. 34a.) (Emphasis in original.)

Indeed, the consideration the district court gave to this issue contrasts markedly with the analysis that the United States suggests must be made in such a case. Thus, for example, the United States concludes that "a defendant's evidence of substantial nonracial purposes served by taking or continuing the particular state action in question should be weighed by the court against plaintiff's evidence indicative of improper racial purpose before the ultimate finding of invidious discrimination (or lack thereof) is made." (U.S. Amicus Br. 57.) It is apparent that the district court conducted no analysis directed to the inherently difficult question whether any legislative inaction in this case was motivated by a discriminatory purpose.[10]

[10] For proof of discriminatory intent, the appellees heavily rely on the tangled history of two proposals to modify Mobile County's at-large electoral system considered by the Alabama legislature during the pendency of this litigation. The claim by the appellees is that these legislative proposals were devised by the school board as part of a strategy "to interfere with any prompt judicial resolution of this case by procuring the introduction or passage of deliberately defective state legislation. . . ." (Appellees' Br. 7.) The appellees argue strenuously that the alleged bad faith of the school board and its counsel in litigating this case is, somehow—the connection is never made clear—directly supportive of their claim that the district court "found" the maintenance of at-large elections to be the result of purposeful discrimination by the state.

The appellees' effort to buttress their case with the discussion of the abortive legislation (and of school board actions that followed the district court's districting orders, Appellees' Br. 20-31) is unavailing. Most basically, whatever the truth of the appellees' claims of bad faith—and the appellees' summary of the "facts" is plainly unfair to the appellants—the implicit representation that the district court based its decision on them is certainly wrong. Notwithstanding the appellees' characterizations, there is no indication in the trial judge's opinion that he considered these matters significant to his factual findings on the appellees' case. Indeed, the circumstances involving these legislative proposals were mentioned by the judge only in the "Conclusions of Law" section of his opinion, and then only to

(footnote continued)

IV. THE APPELLEES' BELATED STATUTORY CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 ARE WITHOUT MERIT.

Perhaps recognizing the frailties of their constitutional theories, the appellees open their argument in this Court with a statutory contention that they never made below. They argue that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, should be construed to grant them a private right of action *broader* than their rights under the Fourteenth and Fifteenth Amendments, *i.e.* a right to have an at-large electoral system dismantled as unconstitutional because of its effects on the candidacies of blacks. The Government significantly makes no such argument. The failures of the appellees' argument can be briefly stated.

In the first place, whatever its merits, the appellees' statutory argument comes too late for proper consideration by this Court. The appellees concede that neither court below considered the statutory claim (Appellees' Br. 12), but they do not add that at no time did they urge any distinction between a cause of action under Section 2 of the Voting Rights Act and one based upon the Constitution or urge that the case be decided on this alternative statutory ground.[11] As recently noted by Mr. Justice

(footnote continued)

deny the appellants' motion to dismiss based on the alleged "unclean hands" of the appellees. (J.A. 22a-26a.) At the least, any factual issues relating to these matters that might be thought to bear on the merits of the case should be resolved, in the first instance, in the trial court and not, as the appellees would have it, in this Court.

[11] Although the appellees contend that the district court "held that section 2 establishes a private cause of action" (Appellees' Br. 12) the "holding" of the court was only in ruling on a preliminary motion to dismiss and had no bearing on its ultimate decision on the merits. (See J.A. 83a.) Moreover, in contrast to their position in this Court, the appellees gave no clue to the district court or to the court of appeals that they understood their alleged "private" rights under Section 2 to be broader than their constitutional rights.

Powell in *Regents of the University of California* v. *Bakke*, 98 S.Ct. 2733, 2745 (1978), "this Court has been hesitant to review questions not addressed below," citing *McGoldrick* v. *Compagnie Generale Transatlantique*, 309 U.S. 430 (1940), *Massachusetts* v. *Westcott*, 431 U.S. 322 (1977) (*per curiam*), and *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969).

Moreover, both the existence of the appellees' claimed private right of action under Section 2 of the Voting Rights Act and its breadth are subject to serious doubts. At most, any private right of action under Section 2 tracks rights granted by the Fifteenth Amendment, and we have shown that such rights are subject to the very requirement of purposeful discrimination that the appellees have failed to satisfy in this case.

First, there is serious doubt that there is any private right of action under Section 2. The appellees cite no decided case in which such a private right of action has been recognized; neither do they cite any legislative history of the original 1965 Voting Rights Act. They rely exclusively on a statement by a sponsor of the 1975 amendments to the Act, who made a passing reference to the possibility of private actions under Section 2, among other statutes. (Appellees' Br. 13 n.3.) But this remark was not addressed to any amendment to Section 2. It was made in the course of the consideration of Section 401 of the 1975 Extension of the Voting Rights Act, which amended Section 3 of the Act, 42 U.S.C. § 1973a, to provide that "an aggrieved person" as well as the Attorney General should have the right to equitable remedies contained in the Act upon the successful prosecution of "a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment . . . ." Moreover, taken as a whole, the legislative history of the 1975 Extension leaves doubt whether the single reference

upon which the appellees rely accurately expresses the Congress' view of the existence of a private right of action under Section 2 of the 1965 Voting Rights Act. *See, e.g.*, H.R. Rep. No. 94-196, 94th Cong., 1st Sess. 43 (1975); *id* at 105-06 (Supplemental views); S. Rep. No. 94-295, 94th Cong., 1st Sess. 9 (1975).

But more importantly, both the language of Section 2 of the 1965 Voting Rights Act and the legislative history of the 1975 Extension make it plain that, if a private right of action may be inferred from Section 2, it is no broader than the rights provided by the Fourteenth and Fifteenth Amendments. Indeed the relevant language of Section 2 closely tracks that of the Fifteenth Amendment, and what scant legislative history there is suggests that Section 2 was included in the Voting Rights Act of 1965 as a kind of "preamble" to make the basic guarantees of the Fifteenth Amendment apparent on the face of this implementing legislation. *See* 111 Cong. Rec. 10851 (1965) (remarks of Senator Stennis, an opponent of the bill); *Hearings on S. 1564 Before the Senate Judiciary Committee*, 89th Cong., 1st Sess., pt. 1 at 172, 208 (1965) (remarks of Senator Dirksen, a co-sponsor of the legislation). There is no indication in the legislative history that Congress intended private actions arising under the Voting Rights Act to permit enforcement of rights broader than those guaranteed by the Fifteenth Amendment—the rights that the Act was intended to effectuate. *See South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966); *United States* v. *Mississippi*, 380 U.S. 128 (1965). The purposes of the Court's policy of avoiding constitutional issues by deciding statutory issues would therefore not be served by reaching out to decide this case on the basis of Section 2.

The appellees arrive at their contrary conclusion that Section 2 of the Voting Rights Act of 1965 provides rights

broader than those under the Constitution by claiming that the literal language of Section 2 can be understood only by reference to the terms of Section 5 of the same act. Section 2 provides:

> "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color."

The appellees reason, drawing on their brief in the City of Mobile's case, No. 77-1844, that, although the term "on account of" may suggest that a racially discriminatory motive is required for a violation of Section 2, the term may be disregarded because the same three words appear in Section 5, and in Section 5 the Attorney General is granted broad powers concerning changes in voting practices or procedures in certain jurisdictions that may have the "purpose ... or ... effect" of denying or abridging the right to vote.

This argument is utterly unpersuasive. First, it overlooks the fact that these same three words—"on account of"—are in the Fifteenth Amendment itself. Given the similarity in language, the obvious inference is that Congress intended the words "on account of" in Section 2 to have the same meaning as in the Fifteenth Amendment, an inference supported by the scant legislative history of Section 2. *See, e.g., Hearings on S. 1564, supra* at 208 ("[S]ection 2 ... is almost a rephrasing of the 15th amendment ...") (remarks of Senator Dirksen). Further, the use of the "purpose ... or ... effect" language in Section 5, which section was part of "an unusual, and in some aspects a severe, procedure" to enforce the Fifteenth Amendment, *Allen* v. *Board of Elections*, 393 U.S. 544, 556 (1969), implies, by common

canons of statutory construction, that Congress meant something different in Section 2, where it used different language. *See e.g., National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974); 2A Sands, *Sutherland Statutory Construction* § 47.23 (4th ed. 1973).

In short, the appellees' arguments premised on Section 2 of the Voting Rights Act are belated and strained efforts to avoid the effects of their failure to prove their case under the Fourteenth and Fifteenth Amendments as construed by this Court.

CONCLUSION

For the reasons stated here and in our opening brief, the judgment below should be reversed and the case should be remanded to the district court to restore a school board whose members are elected from Mobile County at large pursuant to the governing state statutes.

Respectfully submitted,

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